

***KE ALA LOA - THE LONG ROAD:***  
**NATIVE HAWAIIAN SOVEREIGNTY AND THE STATE OF**  
**HAWAII**

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Diacritical marks change the meaning of words in the Hawaiian language. Thus, in this article diacritical marks are used in Hawaiian words except in case names, certain titles, and quotations where Hawaiian words appear as they did in the original texts. Unless otherwise noted, all translations are the author's.

## I. INTRODUCTION

On July 6, 2011, prominent members of the Native Hawaiian community gathered at Washington Place, the home of Queen Lili'uokalani, the last reigning monarch of the Hawaiian Kingdom. They had come to witness the State's Governor sign a law recognizing Native Hawaiians as the "only indigenous, aboriginal, maoli population" of Hawai'i.<sup>1</sup> The immediate goal of this "State Recognition" law is the establishment of a roll of qualified Native Hawaiians; the long term goal is organization of a Native Hawaiian government to gain political recognition from the federal government.<sup>2</sup> At the very least, the new law signals the State's support for federal recognition; at the most, as optimistically heralded by the local newspapers, it is "an important step for sovereignty."<sup>3</sup>

While the festivities inside included Hawaiian music, traditional *oli* (chant) and *hula* (dance), and speeches by Native Hawaiian lawmakers, outside the gates Hawaiian independence advocates chanted and held signs, one of which read, "Hell no, we won't enroll. Neither would the Queen."<sup>4</sup> Even among those supporting federal recognition for Native Hawaiians, there were questions. Will Native Hawaiians participate and enroll? If enrollment is successful, will Native Hawaiians take the next step and hold a constitutional convention to organize a government? Will the roll replace, complement, or duplicate a similar process set out in the Akaka Bill, the pending federal recognition bill?

Native Hawaiians have a complex relationship with the State of Hawai'i. In the 1950s, many of Hawai'i's native people joined with the descendants of immigrant plantation workers and the nascent labor movement to wrest political control from the elite white-controlled sugar plantations and corporations.<sup>5</sup> Some Native Hawaiian leaders fought for and welcomed statehood in 1959, believing it would provide greater economic opportunity and increased political power.<sup>6</sup> Today, people of Hawaiian ancestry constitute more than twenty percent of Hawai'i's population<sup>7</sup> and, as a voting

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1. Act of July 6, 2011, No. 195, §§ 1-2, 2011 Haw. Sess. Laws. Maoli means "[n]ative, indigenous, aborigine, genuine, true, real." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 222 (1971).

2. Act of July 6, 2011, No. 195, § 1, 2011 Haw. Sess. Laws.

3. Editorial, *An Important Step for Sovereignty*, HONOLULU STAR - ADVERTISER, July 11, 2011, [www.staradvertiser.com/editorials/20110711\\_An\\_important\\_step\\_for\\_sovereignty.html?id=125333648](http://www.staradvertiser.com/editorials/20110711_An_important_step_for_sovereignty.html?id=125333648).

4. Chad Blair, *'First Step' to a Native Hawaiian Governing Entity*, HONOLULU CIV. BEAT, July 6, 2011, [www.civilbeat.com/articles/2011/07/06/12000-first-step-to-a-native-hawaiian-governing-entity/](http://www.civilbeat.com/articles/2011/07/06/12000-first-step-to-a-native-hawaiian-governing-entity/).

5. See, e.g., TOM COFFMAN, THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAII 146-47 (2003) (discussing the efforts of Democratic Party leader, John Burns, to build a political alliance with Native Hawaiians). For works describing the involvement of Native Hawaiian William S. Richardson with the Democratic Party see CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 17-18 (1985); James S. Burns, *William S. Richardson: A Leader in Hawai'i's Successful Post-WWII Political and Judicial Revolution*, 33 U. HAW. L. REV. 25, 26-28 (2010).

6. But see COFFMAN, *supra* note 5, at 289-91 (discussing Native Hawaiian attitudes toward statehood).

7. According to the 2010 Census, Hawai'i's population is 1,360,301, while 289,970 people of Hawaiian ancestry live in Hawai'i. U.S. Census Briefs, *The Native Hawaiian and Other Pacific Islander Population: 2010*, 19, Tbl. 7, <http://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

group, still have political influence within the state.<sup>8</sup> Nevertheless, the promise of increased economic and educational opportunity and full participation in society has proved hollow for Native Hawaiians.<sup>9</sup>

This article begins with a brief discussion of the genesis of the relationship between the Native Hawaiian community and the State, a relationship rooted in Hawai'i's 19<sup>th</sup> century history and the illegal overthrow of the Hawaiian Kingdom. The article then looks at the Hawai'i Admission Act, a federal-state compact, giving the State specific responsibilities for the Hawaiian Home Lands Trust and the "Ceded" Lands Trust. These responsibilities have been further defined constitutionally, statutorily, and through case law. As articulated in 1978 amendments to the Hawai'i Constitution, the State has made significant commitments to the Native Hawaiian community.<sup>10</sup> Moreover, as the new State Recognition Act illustrates, the State has supported Native Hawaiian "self-determination" efforts.<sup>11</sup>

Disputes over lands and resources, however, are inherent in the relationship between the Native Hawaiian community and the State. Thus, this article focuses on recent controversies in the Native Hawaiian–State relationship: First, litigation and resulting legislation related to the use and disposition of State-controlled "ceded" lands, which are the Crown and Government Lands of the Hawaiian Kingdom; and second, efforts by the Office of Hawaiian Affairs to resolve disputes over past due revenues from these lands.

With the uncertain future of federal recognition for Native Hawaiians, the relationship between the Native Hawaiian community and the State takes on increased importance. This article suggests that in its relationship with the State of Hawai'i, the

8. See Lisa Asato, *Courting the Hawaiian Vote*, 25 KA WAI OLA, No. 10, Oct. 2008, [www.oha.org/kwo/2008/10/story02.php](http://www.oha.org/kwo/2008/10/story02.php); Liza Simon, *Kanaka Kuleana: Power at the Polls*, 25 KA WAI OLA, No. 10, Oct. 2008, [www.oha.org/kwo/2008/10/story01.php](http://www.oha.org/kwo/2008/10/story01.php).

9. For instance, in 2005, although Hawai'i had an overall 9.8 percent poverty rate, the poverty rate for Native Hawaiians was 15 percent; moreover, of the group considered below the poverty level in Hawai'i, 27 percent were Native Hawaiian. See Seji Naya, Emeritus Professor, University of Hawai'i, Presentation at the 2<sup>nd</sup> Annual Hawaiian Business Conference: Income Distribution and Poverty Alleviation for the Native Hawaiian Community 3 (May 22-23, 2007), *available at* [http://www.oha.org/pdf/eco/2007/expo/naya\\_income.pdf](http://www.oha.org/pdf/eco/2007/expo/naya_income.pdf). According to a recent study by the State Office of Hawaiian Affairs, Native Hawaiians make up "27 percent of all arrests [in Hawai'i], 33 percent of [those] in pretrial detention, 29 percent of [those] sentenced to probation, 36 percent admitted to prison in 2009, 39 percent of the incarcerated population, 39 percent of releases on parole, and 41 percent of parole revocations." OFFICE OF HAWAIIAN AFFAIRS, *THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM* 10 (2010). In 2005, of the 1,708 Hawai'i State prisoners sent to out-of-state facilities, 41 percent were Native Hawaiian. *Id.* at 11. "Forty-four percent of the women incarcerated . . . [by] the state of Hawai'i are Native Hawaiian." *Id.* In a speech on the floor of the U.S. Senate in 2005, Senator Daniel Inouye noted that Native Hawaiians have the highest cancer mortality rate in Hawai'i, "21 percent higher than the rate for the total State male population and 64 percent higher than the rate for the total State female population." 151 CONG. REC. S660 (daily ed. Jan. 31, 2005) (Statement of Sen. Inouye) "Nationally, Native Hawaiians have the third highest mortality rate as a result of breast cancer." *Id.*

10. See *infra* Part II.E.

11. For instance, in 1993, the Legislature enacted Act 359 "to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." Act of July 1, 1993, No. 359, §2, 1993 Haw. Sess. Laws 1009, 1010. Act 359 established a Hawaiian Sovereignty Advisory Commission to advise the Legislature on a voting process to determine Native Hawaiian views on a constitutional convention. Subsequent legislation amended the process and called for a Native Hawaiian vote on the issue. Act of June 21, 1994, No. 200, 1994 Haw. Sess. Laws 479; Act of June 12, 1996, No. 140, 1996 Haw. Sess. Laws 313.

Native Hawaiian community has been most successful in advancing its political sovereignty through expressions of cultural sovereignty. Cultural sovereignty is the effort of Native people and Native nations “to exercise their own norms and values in structuring their collective futures.”<sup>12</sup> For Native peoples, sovereignty has been defined by Western norms, and the relationship between Indigenous peoples and the nation states has been dictated by the dominant societies. Thus, in the United States, tribal sovereignty is sovereignty limited by overarching federal authority and defined by U.S. courts, which have become increasingly more hostile to the exercise of political sovereignty by Native nations. In contrast, “cultural sovereignty is a process of reclaiming culture and of building nations”<sup>13</sup> that first looks inward to Native peoples’ own values, norms, and traditional systems and then seeks natural expression of those values, norms, and traditional systems in sovereignty.

The cultural sovereignty framework embraces the complexity of the Native Hawaiian experience by integrating cultural and spiritual values, history, and group relationships and aspirations. This article examines areas in which Native Hawaiians have reclaimed and restored the cultural norms, values, and practices that lead to and express cultural sovereignty. These areas include regaining Native Hawaiian lands, reclaiming traditional and customary practices, and restoring Hawaiian language fluency. Irrespective of federal or state recognition, as long as Hawaiians continue to exercise cultural sovereignty, they will thrive as a unique and distinct Native people.

## II. THE GENESIS OF THE NATIVE HAWAIIAN-STATE RELATIONSHIP

Native Hawaiians, like many indigenous peoples, are literally rooted in their land and environment.<sup>14</sup> Thus, “[l]and, and the vast changes in the Hawaiian land tenure system”<sup>15</sup> after European contact in 1778 and throughout the nineteenth century, help to explain the current controversies between the State and Native Hawaiians.

By 1810, the High Chief Kamehameha I united the Hawaiian Islands under one rule.<sup>16</sup> Less than thirty years later, Native Hawaiian *ali'i* (chiefs) had constructed a constitutional monarchy, promulgated written laws, and organized a nation-state that was recognized as a member of the international community.<sup>17</sup> Hawaiian Kingdom government institutions were consistent with Hawaiian cultural ideas of sovereign authority and responsibility, but Native Hawaiians also adopted American and European structures to express those ideals.<sup>18</sup>

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12. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

13. *Id.* at 191.

14. NATIVE HAWAIIAN RIGHTS HANDBOOK 3-5 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK]; see *infra* Part IV (discussing Native Hawaiian genealogical and spiritual connection to land).

15. HANDBOOK, *supra* note 14, at 3.

16. See *id.* at 5; see also Apology Resolution, Pub. L. No. 103-150, para. 2, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

17. See HANDBOOK, *supra* note 14, at 5-6; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 364-68 (Nell Jessup Newton et al. eds., 2005) (discussing the development of constitutional government and recognition by international community); see also Apology Resolution, *supra* note 16, at para. 3.

18. HANDBOOK, *supra* note 14, at 5-6.

In the mid-nineteenth century, King Kamehameha III instituted the Māhele, a process that converted the Hawaiian use-rights land system into a fee simple private property system.<sup>19</sup> One result of the Māhele was the creation of two important categories of land — almost a million acres of the King’s personal lands, eventually designated as the Crown Lands, and the more than 1.5 million acres of Government Lands of the Hawaiian Kingdom.

After the Māhele, the Hawaiian economy increasingly depended on large agricultural crops, especially sugar, grown on primarily American-owned plantations. Economic interests began to favor annexation to the United States to ensure that Hawaiian sugar and other products could enter the United States tariff free. In 1887, these business interests forced King Kalākaua to adopt a new constitution, known as the Bayonet Constitution, limiting the crown’s authority, effectively increasing the influence of the white business class, and disenfranchising most Native Hawaiians.<sup>20</sup>

#### *A. The 1893 Overthrow of the Hawaiian Kingdom*

By the 1890s, Native Hawaiians had lost ownership of most lands, were excluded from the economic mainstream, and were in danger of losing political authority as well.<sup>21</sup> In January 1893, Queen Lili‘uokalani, King Kālākaua’s successor, sought to promulgate a new constitution returning authority to the throne and the Native people.<sup>22</sup>

In response, a small group of men representing Western commercial interests formed a Committee of Safety to overthrow the Hawaiian government.<sup>23</sup> They received the aid of John L. Stevens, U.S. Minister to the Hawaiian Kingdom, who caused U.S. military forces to land in Honolulu on January 16, 1893.<sup>24</sup> On the afternoon of January 17th, the Committee of Safety proclaimed the Hawaiian monarchy abolished and the establishment of a provisional government.<sup>25</sup> Minister Stevens quickly extended

19. See LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992) for a detailed explanation of the Māhele. The Māhele process “transformed the traditional Land tenure system from one of communal tenure to private ownership on the capitalist model.” *Id.* at 8. The *ali‘i* (chiefs) also received over one and a half million acres of land during this process, while the native tenants received small parcels of land totaling about 28,658 acres. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 42, 48 (2008); see *infra* Part IV.B. (discussing the law allowing native tenants to make land claims).

20. See HANDBOOK, *supra* note 14, at 11. For example, the House of Nobles, previously appointed by the King from the Hawaiian chiefly class, were now to be elected by male residents of Hawaiian, European or American birth, with a certain amount of wealth. Compare *Hawaiian Islands Constitution of 1864 art. 45*, reprinted in THE FUNDAMENTAL LAW OF HAWAII 169, 174 (Lorrin A. Thurston ed., 1904) (Nobles appointed by the King) with *Hawaiian Islands Constitution of 1887*, art. 59, *id.* at 189 (Nobles elected by residents).

21. By the 1890s, for every four acres of land belonging to private owners, Westerners held three acres. LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 251 (1961). The relatively small number of Westerners owned over a million acres. ROBERT H. HORWITZ, LEGISLATIVE REFERENCE BUREAU REPORT NO. 3: PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 4 (1967). The 1890 census reflected the severe decimation of the Hawaiian population; the census counted 34,436 pure Hawaiians and 6,186 Hawaiians of mixed race. ROBERT SCHMITT, HISTORICAL STATISTICS OF HAWAII 25 tbl.1.12 (1977). In addition to the loss of lands, Hawaiians were also losing the battle to survive as a people.

22. TOM COFFMAN, NATION WITHIN 119-20 (2003).

23. HANDBOOK, *supra* note 14, at 44; Apology Resolution, *supra* note 16, at para. 5.

24. Apology Resolution, *supra* note 16, at paras. 5-6.

25. *Id.* at para. 7.

diplomatic recognition to the provisional government, even before the Queen yielded.<sup>26</sup> The Queen, seeking to avoid bloodshed, relinquished her authority to the United States under protest, fully expecting that the United States would repudiate Stevens' actions.<sup>27</sup>

On February 1, Stevens proclaimed Hawai'i a protectorate of the United States and the American flag was raised in Honolulu.<sup>28</sup> The provisional government immediately sought annexation to the United States, but after an investigation, newly inaugurated President Grover Cleveland called for restoration of the monarchy.<sup>29</sup> In a message to Congress on December 18, 1893, President Cleveland admitted that "the government of a peaceful and friendly people was overthrown."<sup>30</sup> "[A] 'substantial wrong has thus been done,'" concluded the President, "'which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair.'"<sup>31</sup> Realizing that annexation would not be immediately forthcoming, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawai'i.<sup>32</sup>

### *B. Annexation and the "Ceded" Lands*

In 1897, U.S. President William McKinley took office on a platform advocating "control" of Hawai'i.<sup>33</sup> The new administration negotiated an annexation treaty ratified by the Republic's Senate.<sup>34</sup> Native Hawaiians and other citizens of Hawai'i presented petitions to the U.S. Senate — over 21,000 signatures — protesting annexation and calling for the restoration of the Hawaiian monarchy.<sup>35</sup> The 1897 annexation treaty failed.<sup>36</sup>

26. HANDBOOK, *supra* note 14, at 12.

27. LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN, APPENDIX B, EXTRACTS FROM STATEMENT MADE BY THE QUEEN TO MINISTER BLOUNT, 387-390 (12th ed. 1976); Apology Resolution *supra* note 16, at para. 9.

28. Apology Resolution, *supra* note 16, at para. 11.

29. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-1894), at 97-98 (1959); Apology Resolution, *supra* note 23, at para. 15.

30. Apology Resolution, *supra* note 16, at para. 14.

31. President's Message Relating to the Hawaiian Islands, H.R. Doc. No. 47, 53rd Cong., 2d Sess. (1893); see also Apology Resolution, *supra* note 16, at para. 15 (quoting President Cleveland).

32. Apology Resolution, *supra* note 16, at para. 20. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC (1894-1898), at 33-34 (1961). Russ notes:

Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that . . . [the Republic's] constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic. Hence, even those Kanaka (Hawaiians) who could fulfill the requirements generally refused to register, to vote, and to take part in the Government when it was established.

*Id.*

33. HANDBOOK, *supra* note 14, at 14.

34. Resolution of the Senate of Hawai'i Ratifying the Treaty of Annexation of 1897, *reprinted in* THE FUNDAMENTAL LAW OF HAWAII, *supra* note 20, at 247; WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-94), at 198 (1959).

35. In 1897, a Hawaiian delegation carried two sets of petitions — one gathered by the Hui Aloha 'Āina and the other by the Hui Kālai'āina — with almost 38,000 signatures against annexation, to Congress. Senator George Hoar, who met with the delegation, read the text of the Hui Aloha 'Āina petitions, which had garnered over 21,000 signatures, into the Congressional Record during the Senate debate on annexation. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 157-59 (2004).

36. Silva notes that the Hawaiian delegation was originally told that there were 58 votes in the Senate for

However, the next year pro-annexation forces introduced a joint resolution of annexation.<sup>37</sup> The annexation of Hawai‘i by joint resolution was hotly debated in the U.S. Senate, with many arguing that the United States could acquire territory only under the treaty-making power of the U.S. Constitution, requiring ratification by two-thirds of the Senate.<sup>38</sup> Nevertheless, with the advent of the Spanish-American War, the islands became strategically significant.<sup>39</sup> Ultimately, the United States acquired Hawai‘i through a joint resolution, with a simple majority in each house.

The Joint Resolution of Annexation<sup>40</sup> “made no provision for a vote by Native Hawaiians or other citizens.”<sup>41</sup> Under the resolution, the United States received approximately 1.8 million acres of public, Government, and Crown Lands.<sup>42</sup> In the *Māhele*, King Kamehameha III had set apart “forever to the chiefs and people,” the more than 1.5 million acres of Government Lands.<sup>43</sup> At the same time, Kamehameha III had reserved the Crown Lands as his own personal lands and as a source of income and support for the crown.<sup>44</sup> Thus, although “the fee simple ownership system instituted by the *Māhele* and the laws that followed drastically changed Hawaiian land tenure, the Government [Lands] and Crown Lands were held for the benefit of all the Hawaiian people.”<sup>45</sup> For Native Hawaiians, the Government and Crown Lands “marked a continuation of the trust concept” that the sovereign held the lands “on behalf of the gods and for the benefit of all.”<sup>46</sup>

At the time of annexation, the United States implicitly recognized the unique nature of the Government and Crown Lands. Although the Joint Resolution of Annexation “cede[d] and transfer[red] . . . the absolute fee and ownership of all public, Government, or Crown lands”<sup>47</sup> to the United States, federal public land laws were not

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the treaty, only two votes shy of the 60 needed for passage. By the time the delegation left Washington, there were only 46 votes on the pro-annexation side. *Id.*

37. HANDBOOK, *supra* note 14, at 15.

38. Annexationists pointed to the acquisition of Texas in 1845 by joint resolution as precedent, but Texas had been brought into the Union under Congress’ power to admit new states. Further, the joint resolution utilized in the Texas case was approved by a plebiscite held in Texas. No plebiscite was proposed for Hawai‘i. One Senator offered an amendment to the Newlands measure providing for such a vote by all adult males, but it was defeated. Finally, on June 15, 1898, by a vote of 209 to 91, the House approved the Newlands resolution. On July 6, 1898, the resolution passed the Senate by 42 to 21, with 26 abstentions. 31 CONG. REC. S6138, 6149 (June 20, 1898); *id.* at 6310 (June 24, 1898); *id.* at 6709-10 (July 6, 1898); *id.* at 6018-19 (June 15, 1898); *id.* at 6712 (July 6, 1898).

39. *See, e.g., id.* at 5982 (June 15, 1898); *id.* app. at 669-70 (June 13, 1898).

40. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750.

41. HANDBOOK, *supra* note 14, at 79.

42. *Id.*; Apology Resolution, *supra* note 16, at para. 25.

43. *See* 2 REVISED LAWS OF HAWAII, 1925, at 2152-76 (listing of lands and act confirming division of lands); *see also* An Act Relating to the Crown, Government, and Fort Lands, June 7, 1848, *reprinted in* VAN DYKE, *supra* note 19, app. 2.

44. *See* sources cited *supra* note 43; *In re Estate of Kamehameha*, 2 Haw. 715, 722-23 (Haw. 1864). In 1865, the Crown Lands were made inalienable. *See* Act Rendering the Crown Lands Inalienable, January 3, 1865, *reprinted in* VAN DYKE, *supra* note 19, app. 5.

45. HANDBOOK, *supra* note 14, at 26.

46. *Id.*; *see, e.g.,* DAVIANNA POMAIIKA‘I MCGREGOR, NĀ KUA‘AINA 31-39 (2007); VAN DYKE, *supra* note 19, at 8-10, 54-58, 212-15.

47. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750.

applied to Hawai'i. Instead, Congress was to enact "special laws for [the] management and disposition"<sup>48</sup> of the "ceded" lands. Moreover, the revenues from the lands, with certain exceptions, were to be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."<sup>49</sup>

In 1900, Congress enacted an Organic Act<sup>50</sup> for the new territory that established a territorial government and confirmed the cession of lands to the United States. The Organic Act gave the territory the "possession, use, and control"<sup>51</sup> of the lands, but stipulated that proceeds from the lands were to be utilized for purposes "consistent with the [J]oint [R]esolution of [A]nnexation."<sup>52</sup> Consequently, while the Republic had "ceded" the Crown and Government Lands to the United States, both the Joint Resolution of Annexation and the Organic Act recognized that these lands were impressed with a special trust.<sup>53</sup>

### C. *The Hawaiian Homes Commission Act*<sup>54</sup>

In 1921, Congress passed the Hawaiian Homes Commission Act ("HHCA"),<sup>55</sup> setting aside about 203,000 acres of "ceded" lands for a homesteading program to provide residences, farms, and pastoral lots for Native Hawaiians of fifty percent or more Hawaiian ancestry.<sup>56</sup>

Prior to annexation, the Republic established a general homesteading program on Government and Crown Lands.<sup>57</sup> In 1910, Congress amended the Organic Act, directing the Territory to open these lands for general homesteading in a given area when twenty-five or more qualified homesteaders applied for land.<sup>58</sup> Since sugar plantation leases on about 26,000 acres of prime lands were due to expire during the 1920s and 1930s, Hawai'i's large plantation owners feared that homesteading would impact their

48. *Id.*

49. *Id.* In an 1899 opinion, the U.S. Attorney General interpreted the Joint Resolution as creating a "special trust" for the benefit of Hawai'i's inhabitants. *See* *Hawaii-Public Lands*, 22 Op. Att'y. Gen. 574 (1899).

50. Hawaiian Organic Act, April 30, 1900, ch. 339, 31 Stat. 141 (1900).

51. *Id.* § 91. Section 95 of the 1894 Constitution of the Republic had declared the Crown Lands to be the property of the Hawaiian government and free of any trust. *See* *Liliuokalani v. United States*, 45 Ct. Cl. 418, 428 (Ct. Cl. 1910). Similarly, section 99 of the Organic Act declared that the Crown Lands were "free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof." *See* Hawaiian Organic Act § 99.

52. *Id.* § 73.

53. HANDBOOK, *supra* note 14, at 26-27. *See* Comment, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101, 115-18 (1981) for a discussion of the unique nature of Hawai'i's lands, which concludes that "the federal government had become in effect trustee of the lands ceded by Hawaii, holding absolute but 'naked' title for the benefit of the people of Hawaii."

54. An earlier version of some of the text in this section has appeared in HANDBOOK, *supra* note 14, ch. 1.

55. Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691-718 (1958)) (omitted from codification in 1959) (set out in full as amended at HAWAIIAN HOMES COMMISSION ACT, 1920, §§1-516 (Westlaw through 2011 legislation)) [hereinafter HHCA].

56. *Id.* § 208. *See* Alan Murakami, chapter 3, *Hawaiian Homes Commission Act*, in HANDBOOK, *supra* note 14, at 43-76 for a discussion of the history and implementation of the HHCA.

57. The Land Act of 1895, CIVIL LAWS OF 1897, § 169; *see* ROBERT H. HORWITZ ET AL., LEGISLATIVE REFERENCE BUREAU REPORT NO. 5: PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS 5-15 (1969) (detailed analysis of the Act); VAN DYKE, *supra* note 19, at 188-99 (discussing the 1895 Land Act).

58. Act of May 27, 1910, ch. 258, § 5, 36 Stat. 443, 446 (amending Hawaiian Organic Act, April 30, 1900, ch. 339, 31 Stat. 141 (1900)).



successful plantations.<sup>59</sup>

During the same period, Hawaiian leaders became alarmed by the rapidly deteriorating conditions of the Hawaiian people.<sup>60</sup> Dispossessed from their traditional lands and seeking work, Hawaiians became members of the “floating population crowding into the congested tenement districts of the larger towns and cities” under conditions that many believed would “inevitably result in the extermination of the race.”<sup>61</sup> As one report on the HHCA program put it, “[e]conomically depressed, internally disorganized and politically threatened, it was evident that the remnant of Hawaiians required assistance to stem their precipitous decline.”<sup>62</sup>

These forces converged to promote passage of the HHCA. The homesteading approach to rehabilitation was “further reinforced . . . by the suggestion that dispossessed Hawaiians would be returning to the soil, going back to the cultivation of at least a portion of their ancestral lands.”<sup>63</sup> Although originally opposed, ultimately the sugar growers supported the HHCA because it carefully restricted the lands in the homesteading program,<sup>64</sup> excluding cultivated sugar cane lands.<sup>65</sup> Changes to the Organic Act, enacted as part of the trade-off to gain support of the HHCA, eliminated the threat of losing fertile sugar producing lands.<sup>66</sup> Most homestead lands set aside for the HHCA lacked water and were of only marginal agricultural value.<sup>67</sup> Moreover, Hawaiian leaders originally proposed that all Native Hawaiians should be eligible for homesteading; however, sugar interests maneuvered to have the blood quantum set at fifty percent, limiting the number of Hawaiians that could seek land<sup>68</sup> and setting the stage for future disputes both within the Hawaiian community and between Native Hawaiians and the State over who is a Native Hawaiian.<sup>69</sup>

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59. TOM DINELL ET AL., LEGISLATIVE REFERENCE BUREAU REPORT NO. 1: THE HAWAIIAN HOMES PROGRAM: 1920-1963: A CONCLUDING REPORT 6 (1964).

60. See generally Davianna Pōmaika'i McGregor, *‘Āina Ho‘opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1 (1990).

61. S. CON. RES. 2, 10th Leg. of the Territory of Hawaii, 1919 SENATE J. 25-26.

62. DINELL ET AL, *supra* note 59, at 2-3. For instance, the general crime rate for people of Hawaiian ancestry, as well as the rate of juvenile delinquency, was significantly higher than that of other groups. *Id.*

63. *Id.* at 7.

64. See McGregor, *supra* note 60, at 14-27.

65. HHCA, ch. 42, § 203, 42 Stat. 108, 109-10 (1921). Also excluded were lands under a homestead lease, right of purchase lease, or certificate of occupation. *Id.*

66. HANDBOOK, *supra* note 14, at 44-48.

67. See ALLAN A. SPITZ, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1B: LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM 19-26 (1964).

68. H.R. REP. NO. 839, 66th Cong., 2nd Sess. (1920); see J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENITY (2008) (providing background on the blood quantum restrictions of the HHCA). See generally M.M. Vause, The Hawaiian Homes Commission Act, History and Analysis (June 1962) (unpublished M.A. thesis, University of Hawai‘i) (on file with Hamilton Library, University of Hawai‘i) (discussing factors leading to the passage of the HHCA including the blood quantum limitations).

69. See *Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010) (challenge to use of “ceded” lands trust revenues to benefit those of less than fifty percent Hawaiian ancestry). See discussion of Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 219 P.3d 1111 (Haw. 2009), *infra* Part III.A.1.

#### D. Statehood and the Admission Act

In 1959, Hawai'i was admitted as a state.<sup>70</sup> Although the vote for statehood among Hawai'i's electorate was overwhelmingly in favor, Native Hawaiian responses were more nuanced.<sup>71</sup> Remaining subject to "colonial control of the executive branch of government" from Washington D.C. and the "enormous influence of the U.S. Navy," as well as domination by the sugar and pineapple companies, was not a choice.<sup>72</sup> On the other hand, "[t]o all groups in Hawai'i statehood signified *finality*. For the [Americans of Japanese Ancestry] the finality would be first-class citizenship. But, the finality for native Hawaiians might well be a final severing of any ties to their once different world and their culture."<sup>73</sup>

The Hawai'i Admission Act recognized the special status of Hawai'i's public lands and reflected the intent to return those lands to the new state. This approach differed significantly from the legal treatment of lands in other states, where the states received only a small portion of public lands. In contrast, the federal government transferred to Hawai'i title to most of the "ceded" lands held at the time of statehood.<sup>74</sup>

Section 5(f) of the Admission Act commands the State to hold "ceded" lands:

[A]s a public trust for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.<sup>75</sup>

Moreover, the lands, as well as any proceeds and income from the lands or their disposition, must be managed or disposed of for one or more of the trust purposes, as provided by state law.<sup>76</sup>

Section 4 of the Admission Act requires, as a compact with the United States, that

70. Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6 [hereinafter Admission Act].

71. See, e.g., FUCHS, *supra* note 21, at 443-47 (discussing Hawaiian attitudes toward statehood). Fuchs describes Rev. Abraham Akaka's speech at a statehood service in which he attempted to address the disappointment of many Hawaiians over statehood and "asked his people to view statehood as the lifting of the clouds of smoke and the releasing of opportunity for all the peoples of Hawaii." *Id.* at 447.

72. COFFMAN, *supra* note 5, at 10-13; see also FUCHS, *supra* note 21, at 153-55.

73. JOHN S. WHITEHEAD, COMPLETING THE UNION: ALASKA, HAWAII, AND THE BATTLE FOR STATEHOOD 140 (2004) (emphasis in original).

74. *Hawaii's Ceded Lands*, *supra* note 53, at 102. Certain lands — those that had been set aside pursuant to an act of congress, executive order, presidential proclamation, or gubernatorial proclamation — remained the property of the United States. Admission Act, Pub. *supra* note 70, § 5(c), 73 Stat. 4, 5. These "retained" lands could be transferred to the new state within five years of Hawai'i's admission if the United States no longer needed them. *Id.* § 5(e). Congress subsequently passed an act allowing the transfer of these lands to the state at any time they are declared unnecessary to federal needs. Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

75. Admission Act, *supra* note 70, § 5(f) (emphasis added).

76. Admission Act § 5(f) states: "Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States." The United States has a general fiduciary obligation to bring suit for breaches of trust, but "5(f) provides only that the United States may bring suit for such a breach, not that it must." *Han v. United States Dep't of Justice*, 45 F.3d 333, 337 (9th Cir. 1995) (emphasis omitted).

the Hawaiian Homes Commission Act be adopted in the State Constitution.<sup>77</sup> Section 4 also allows the State to increase benefits to HHCA beneficiaries but the United States must approve any changes in the qualifications for beneficiaries.<sup>78</sup> Moreover, under the HHCA itself, Congress maintains the authority to alter, amend, or repeal the HHCA.<sup>79</sup> Consequently, although the State gained principal responsibility for administration of the HHCA in 1959, the federal government also retains significant authority.

When Hawai‘i became a state, only 1,673 Native Hawaiians had received homesteads<sup>80</sup> while 2,200 were on the waiting list awards.<sup>81</sup> Over fifty years later, 9,748 Native Hawaiians have homestead awards but 25,937 Native Hawaiians are on the waiting list.<sup>82</sup> The HHCA is administered by a state agency, the Department of Hawaiian Home Lands (“DHHL”), headed by the Hawaiian Homes Commission.<sup>83</sup> Eight members, representing each island upon which trust lands are located, sit on the Hawaiian Homes Commission.<sup>84</sup> The governor appoints commissioners, four of whom must be of a least one quarter Hawaiian ancestry, and a ninth member to serve as chair, with the advice and consent of the State Senate.<sup>85</sup> The chair is also the director of DHHL and a member of the governor’s cabinet.

The Hawai‘i Supreme Court, in the 1982 decision *Ahuna v. Department of Hawaiian Home Lands*, established that in implementing the HHCA, the State acts as a trustee whose conduct should be “measured by the same strict standards applicable to private trustees.”<sup>86</sup> Moreover, the Hawaiian Homes Commission is the “specific state entity obliged to implement the fiduciary duty under the HHCA on behalf of eligible Native Hawaiians.”<sup>87</sup> Analogizing the relationship between the State and Native Hawaiians to the relationship between the United States and Native Americans, the court determined that the State should be judged by “the most exacting fiduciary standards.”<sup>88</sup>

77. Admission Act § 4 provides, in part: “As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, . . . shall be adopted as a provision of the Constitution of said State . . . .”

78. Section 4 further states: “[A]ny amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States . . . .” *Id.*

79. HHCA, ch. 42, § 223, 42 Stat. 108, 115 (1921) provides: “The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.”

80. SPITZ, *supra* note 67, at 17 tbl.6.

81. DEP’T OF HAWAIIAN HOME LANDS ANNUAL REPORT, ‘ĀINA HO’OPULAPULA, at fig.8 (1980-1981).

82. DEP’T OF HAWAIIAN HOME LANDS, 2009 ANNUAL REPORT 29 (2009) (homestead awards); DEP’T OF HAWAIIAN HOME LANDS, APPLICANT WAITING LIST UP TO DECEMBER 31, 2010 (2010), *available at* [http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31\\_07-Alpha\\_A-K\\_Waitlist\\_245pgs.pdf/](http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_07-Alpha_A-K_Waitlist_245pgs.pdf/).

83. See HHCA § 202 (current with amendments through Haw. 2011 Reg. Sess.).

84. Section 202 provides that the Commission be composed of three members from Honolulu, one member from West Hawai‘i, one member from East Hawai‘i, one member from Moloka‘i, one member from Maui, and one member from Kaua‘i. *Id.*

85. *Id.*

86. *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1169 (Haw. 1982).

87. *Id.* at 1168.

88. *Id.* at 1169 (citations and emphasis omitted). The Hawai‘i Supreme Court stated:

[T]he extent or nature of the [State’s] trust obligations . . . may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives. . . . Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the

The trust duties, the court specified, include the duty to “administer the trust solely in the interest of the beneficiary,” to “use reasonable skill and care” in dealing with trust property,<sup>89</sup> as well as the duty of impartiality when dealing with more than one beneficiary.<sup>90</sup>

#### *E. 1978 State Constitutional Amendments*

Hawai‘i’s 1978 Constitutional Convention and the amendments subsequently approved by voters were seminal developments in Hawai‘i law for Native Hawaiians. Far-reaching amendments spoke to the long-standing claims of the Native Hawaiian community, particularly claims of self-determination and sovereignty. One such amendment established the Office of Hawaiian Affairs (“OHA”) with a board of trustees elected by all Hawaiians, regardless of blood-quantum.<sup>91</sup> Native Hawaiians and the general public were specifically designated as the beneficiaries of the “public [land] trust” and the Government and Crown Lands.<sup>92</sup> The amendments designated a pro rata share of the revenue from the public land trust to be administered by OHA to benefit Native Hawaiians.<sup>93</sup>

Another amendment mandated that the Legislature provide the Hawaiian Home Lands program with sufficient funding.<sup>94</sup> A new provision protected the traditional and customary rights of Native Hawaiian tenants of *ahupua‘a* (traditional land units).<sup>95</sup> The State was also required to “promote the study of Hawaiian culture, history and language,” and institute a Hawaiian education program in public schools.<sup>96</sup> Finally, Hawaiian language was designated one of Hawai‘i’s two official languages.<sup>97</sup>

The successful passage of the amendments can be attributed to many factors,<sup>98</sup>

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analogy between native Hawaiian homesteaders and other native Americans.

*Id.* at 1168-69 (citations omitted).

89. *Id.* at 1169.

90. *Id.* at 1170.

91. HAW. CONST. art. XII, § 5. In 2000, the U.S. Supreme Court struck down the state law limiting OHA voters to Hawaiians as a violation of the 15th Amendment to the U.S. Constitution. *See Rice v. Cayetano*, 528 U.S. 495, 520-22 (2000). The State, the U.S. Solicitor General, and many native rights organizations, had argued that the voting limitation was permissible based upon the political relationship between the United States and native peoples, and the history of special protections for native peoples. *Id.* at 518-24. The Court, however, viewed OHA elections solely as state elections, distinguishable from elections of Indian communities, the internal affairs of quasi-sovereign governments. *Id.* at 522. Subsequently, the Ninth Circuit Court of Appeals also struck down the requirement that candidates for OHA trustees be of Hawaiian ancestry. *Arakaki v. Hawaii*, 314 F.3d 1091, 1098 (9th Cir. 2002). As a result, all Hawai‘i voters elect OHA trustees and any resident can serve as an OHA trustee.

92. HAW. CONST. art. XII, § 4.

93. *Id.* §§ 5-6.

94. *Id.* § 1.

95. *Id.* § 7; *see infra* Part IV.B. (providing a more detailed discussion of Native Hawaiian traditional and customary rights).

96. HAW. CONST. art. X, § 4.

97. HAW. CONST. art. XV, § 4; *see infra* Part IV.C.

98. Former Governor John Waihe‘e, a delegate to the 1978 Constitutional Convention, attributes the success of Native Hawaiian initiatives, in part, to activism in the Native Hawaiian community (as illustrated by the protests over the U.S. Navy’s bombing of the island of Kaho‘olawe), a strong leader in Adelaide “Frenchy” De Soto (Chair of the Hawaiian Affairs Comm. at the Convention), the growing recognition among many in Hawai‘i of the illegal overthrow of the Hawaiian Kingdom, and an increasing cadre of young activist graduates

including the increasing concern by Native Hawaiians and the local community about over-development of ‘āina (land), the “impoverished living conditions” of the Native Hawaiian community,<sup>99</sup> and the realization “by a relatively few disjoined people who saw that their ancestral heritage was rapidly slipping away.”<sup>100</sup> Opposition to U.S. Navy bombing of “the island of Kaho‘olawe became the focal point of a major political movement challenging American control of Hawaii.”<sup>101</sup> Reawakened Hawaiian consciousness was fueled by examples from other ethnic and civil rights movements. Moreover, “[a]round the world indigenous people — about one-tenth of the earth’s population — became more assertive in the course of the 1970s.”<sup>102</sup> “A shift was occurring in the relationship between the colonizing societies and those who had been colonized.”<sup>103</sup>

### III. RECENT CONTROVERSIES IN THE NATIVE HAWAIIAN–STATE RELATIONSHIP: THE “CEDED” LANDS TRUST

The courts have only recently been called upon to scrutinize the state’s trust responsibilities for “ceded” lands under section 5(f) of the Admission Act. Indeed, not until the 1980s did Native Hawaiians begin to benefit from the State’s use and disposition of the trust lands. Prior to 1978, the State directed trust proceeds from section 5(f) toward public education.<sup>104</sup> The 1978 Constitutional amendments sought to clarify the trust beneficiaries and ensure that Native Hawaiians would receive a portion of the trust revenues.<sup>105</sup> Article XII, section 4 of the Constitution provides that the lands

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of the Law School, still a new institution in 1978 with the first class graduating in 1976. John Waihe‘e III, Chairman of the Native Hawaiian Roll Comm’n, Remarks at William S. Richardson Sch. of Law (July 18, 2011) (on file with author).

99. D. Māhealani Dudoit, *Against Extinction: A Legacy of Native Hawaiian Resistance Literature* 7 (on file with *Tulsa Law Review*). Hawaiian writer and scholar, D. Māhealani Dudoit, writes of the various forces affecting Hawai‘i in the 1960s-70s:

By the 1970s, the principal factor that gave rise to the Native Hawaiian movement was the impoverished living conditions of Hawaiians compared to other ethnic groups in Hawai‘i (McGregor 1989b:85). World War II and then statehood (once thought to be a way to gain more political influence) had only opened the door to more foreign influence. The Democratic Party took power in the 1950s and replaced Hawaiians with Japanese in government and commercial positions. Rural Hawaiians moved to the city. Many Hawaiians moved to the [U.S.] continent because life was too expensive in the Islands. . . . The 1960s was also the era of the great social movements in America regarding civil rights, Native Americans, and Vietnam. The movements inspired a new cultural and political consciousness among Hawaiians. In the 1970s, a grassroots movement began to coalesce around land rights issues, simultaneous with a “cultural renaissance” of Hawaiian music, dance, language, and traditions.

*Id.*

100. COFFMAN, *supra* note 5, at 291 (citing Herb Kawainui Kane).

101. MCGREGOR, *supra* note 46, at 48.

102. COFFMAN, *supra* note 5, at 291.

103. *Id.*

104. HAW. LEGISLATIVE AUDITOR, FINAL REPORT ON THE PUBLIC LAND TRUST: A REPORT TO THE LEGISLATURE OF THE STATE OF HAWAII, REPORT No. 86-17, at 14 (1986), *available at* [http://lrhawaii.info/reports/legrpts/auditor/1987/act121\\_slh82.pdf](http://lrhawaii.info/reports/legrpts/auditor/1987/act121_slh82.pdf).

105. *See generally* Standing Comm. Rep. No. 59 & Comm. of the Whole Report No. 13, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 643, 1017 (1980).

granted to the State in the Admission Act, with the exception of Hawaiian Home Lands, are to “be held by the State as a public trust for Native Hawaiians”<sup>106</sup> “and the general public.”<sup>107</sup> Section 5 established OHA to hold assets “in trust for Native Hawaiians and Hawaiians.”<sup>108</sup> Finally, section 6 provided that a pro rata portion of the income and proceeds from lands identified in article XII, section 4, would be included in OHA’s trust assets.<sup>109</sup>

Recent disputes between the Native Hawaiian community and the State over trust lands have focused on two areas — disposition and alienation of the lands and revenue generated from the lands.

#### *A. Disposition and Alienation of Trust Lands*

The first case to challenge the State’s disposition of trust lands involved a land exchange of approximately 27,800 acres of trust lands for a privately owned parcel of 25,800 acres in the Puna District on the Island of Hawai‘i. An individual Native Hawaiian beneficiary, Kaolelo Lambert John Ulaleo, and the Pele Defense Fund (“PDF”) brought suit challenging the land exchange, whose purpose was to allow geothermal development on the trust lands.<sup>110</sup> Ulaleo and PDF contended that the lands had been exchanged without any attempt to assess the impact on the trust purposes set out in section 5(f) of the Admission Act, and that at least two of the trust purposes — “the betterment of the conditions of Native Hawaiians” and public use of the lands — were violated by the exchange.<sup>111</sup> In the 1990 case *Ulaleo v. Paty*, the Ninth Circuit Court of Appeals held that since the land exchange had already been completed, the relief sought was retrospective in nature and barred by the State’s Eleventh Amendment immunity.<sup>112</sup>

In contrast, the federal courts found a specific diversion of trust lands, and thus a

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106. HAW. CONST. art. XII, § 4. OHA was to receive and administer a share of the public land trust funds designated in section 5(f) for the betterment of the conditions of Native Hawaiians, as defined in the HHCA. See Standing Comm. Rep. No. 59 & Comm. of the Whole Report No. 13, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 643, 1017 (1980). The HHCA defines Native Hawaiians as those of not less than half-aboriginal Hawaiian ancestry. See HHCA, ch. 42, § 201(a), 42 Stat. 108 (1921). The OHA amendment names two beneficiaries of the OHA trust — Native Hawaiians (those with fifty percent or more Hawaiian ancestry) and Hawaiians (those with any quantum of Hawaiian ancestry). HAW. REV. STAT. § 10-2 (2009). See *Day v. Apoliona*, 616 F.3d 918, 924-25 (9th Cir. 2010), determining that *federal law* does not require the OHA trustees to use section 5(f) trust funds solely for the benefit of Native Hawaiians of fifty percent or more Hawaiian ancestry; the funds can be utilized for any of the five trust purposes. Moreover, the *Day* court held that the OHA trustees have broad discretion to decide how to serve those purposes. *Id.* at 926-27.

107. HAW. CONST. art. XII, § 4 provides: “The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding . . . [HHCA lands] . . . shall be held by the State as a public trust for native Hawaiians and the general public.”

108. *Id.* § 5.

109. *Id.* § 6 (providing, in part: “The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians . . .”) (emphasis added).

110. *Ulaleo v. Paty*, 902 F.2d 1395, 1396-97 (9th Cir. 1990); see also *infra* Part IV.A. (discussing Wao Kele o Puna, a portion of the land involved in the exchange, and Native Hawaiian efforts to regain Hawaiian lands).

111. *Ulaleo*, 902 F.2d at 1396-97.

112. *Id.* at 1400.

breach of trust, in *Napeahi v. Wilson*.<sup>113</sup> In *Napeahi*, the State had erroneously recertified a shoreline boundary resulting in the loss of 1.75 acres of state-owned tidal ponds, which had then been partially filled for hotel development.<sup>114</sup> The court directed the State to seek compensation from the occupiers of the 1.75 acres of trust lands.<sup>115</sup>

In a state court action brought on the same facts and by substantially the same parties as the *Ulaleo* case, the Hawai'i Supreme Court held in *Pele Defense Fund v. Paty*<sup>116</sup> that the doctrine of *res judicata* barred re-litigation of plaintiff's claims regarding the exchange of trust lands for private property.<sup>117</sup> In an important footnote, however, the court analogized the trust duties of the State in relation to the public land trust with those of the Hawaiian Homes Commission in relation to Hawaiian Home Lands,<sup>118</sup> which the court in the *Ahuna v. Department of Hawaiian Home Lands*<sup>119</sup> case had "measured by the same strict standards applicable to private trustees."<sup>120</sup> The trust duties in relation to "ceded" lands, the Hawai'i Supreme Court affirmed, include the duty to "administer[] the trust solely in the interest of the beneficiaries," to use "reasonable skill and care to make trust property productive," and to act "impartially when there is more than one beneficiary" involved.<sup>121</sup>

In 2008, in a ground-breaking decision implicating Hawai'i's trust duties, the significance of land to Native Hawaiians, and the value of apology, the Hawai'i Supreme Court took the extraordinary step of permanently enjoining the sale or transfer of trust lands.<sup>122</sup> In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i (HCDCH I)*, the Office of Hawaiian Affairs and four individual plaintiffs sought to prevent a state-created entity<sup>123</sup> from transferring two parcels of trust lands to private developers for developments that would include low-cost housing.<sup>124</sup> The case was filed in 1994, soon after the passage of the 1993 Congressional Apology

113. *Napeahi v. Wilson*, 987 F. Supp. 1288 (D. Haw. 1996).

114. *Id.* at 1289-90.

115. Findings of Fact, Conclusions of Law and Order and Stipulation to Dismiss Without Prejudice and Retention of Jurisdiction at 6-7, *Napeahi v. Wilson*, No. 85-0153 DAE (D. Haw. Aug. 15, 1997) (on file with the author).

116. *Pele Def. Fund v. Paty*, 837 P.2d 1247 (Haw. 1992). For further discussion of this case, see *infra* Part IV.A.

117. *Pele Def. Fund*, 837 P.2d at 1261.

118. *Id.* at 1264 n.18.

119. *Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161 (Haw. 1982).

120. *Pele Defense Fund*, 837 P.2d at 1264 n.18 (quoting *Ahuna*, 640 P.2d at 1169).

121. *Id.* (quoting *Ahuna*, 640 P.2d at 1169-70).

122. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. (HCDCH I)*, 177 P.3d 884, 927-28 (Haw. 2008), *rev'd and remanded sub nom. Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). Some of the material on the *HCDCH I* case is based on an article written by a 2008 William S. Richardson School of Law graduate. See Moanikeala Crowell, *Ho'oholo I Mua - Towards Reconciliation?: Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i, KA HE'E*, No. 5, July 2008, *available at* <http://www.stopsellingcededlands.com/Hooholo%20I%20Mua.pdf> (last visited Apr. 9, 2012) (used with permission from the author).

123. *HCDCH I*, 177 P.3d at 896-97 (noting that the original agency involved in the action was the Housing Finance and Development Corporation). Subsequently, the Housing Finance and Development Corporation and the Hawai'i Housing Authority were consolidated into the Housing and Community Development Corporation of Hawai'i (HCDCH); in 2006, the legislature divided HCDCH into two separate agencies. *Id.* at 897 n.9.

124. *Id.* at 896-98 (discussing the history of the parcels). "Alternatively, the plaintiffs sought a declaration" that transferring trust lands would not limit future Native Hawaiian claims to the lands. *Id.* at 891. The La'i'ōpua parcel was subsequently transferred to the Department of Hawaiian Home Lands. *Id.* at 891 n.4.

Resolution<sup>125</sup> and similar state legislation<sup>126</sup> recognizing the Hawaiian community's unrelinquished claims to the trust lands.

Congress, in the Apology Resolution, acknowledged that the Government, Crown, and public lands of Hawai'i were taken "without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government"<sup>127</sup> and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."<sup>128</sup> Congress apologized to the Native Hawaiian people for "the participation of agents and citizens of the United States" in the overthrow of the Hawaiian Kingdom<sup>129</sup> and expressed its commitment to acknowledge the overthrow "in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."<sup>130</sup>

In *HCDCH I*, the plaintiffs argued that the State could not alienate trust lands because of its trust responsibilities to the Native Hawaiian people.<sup>131</sup> The Hawai'i Supreme Court agreed, first declaring that the Apology Resolution had the force of law because it resulted from legislative deliberations.<sup>132</sup> The Court concluded that while the Apology Resolution did not require that trust lands be transferred to Native Hawaiians, it did recognize their unrelinquished claims to the lands.<sup>133</sup> Moreover, the Hawai'i Supreme Court reasoned, the Apology Resolution and analogous state legislation implicated the State's fiduciary duty to preserve the trust lands until the claims of the Native Hawaiian community are resolved through the political process.<sup>134</sup> Relying upon the *Ahuna* and *Pele Defense Fund* cases,<sup>135</sup> the Court stated that "[s]uch duty is consistent with the State's 'obligation to use reasonable skill and care' in managing the public lands trust" and that "the State's conduct 'should . . . be judged by the most exacting fiduciary standards.'"<sup>136</sup>

Although the Hawai'i Supreme Court relied on the Apology Resolution for its factual determinations, it separately based its decision on Hawai'i law, specifically pointing to two 1993 laws in which the State Legislature recognized that "the indigenous people of Hawaii were denied . . . their lands" and made findings similar to those of the Apology Resolution.<sup>137</sup>

In permanently enjoining land sales, the court stated, "without an injunction, any

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125. Apology Resolution, *supra* note 16.

126. 1993 Haw. Sess. Laws 999; 1993 Haw. Sess. Laws 1008.

127. Apology Resolution, *supra* note 16, para. 25.

128. *Id.* at para. 29.

129. *Id.* § 1(3).

130. *Id.* § 1(4).

131. Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. (*HCDCH I*), 177 P.3d 884, 898 (Haw. 2008), *rev'd and remanded sub nom.* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

132. *Id.* at 901.

133. *Id.* at 902.

134. *Id.* at 905, 920.

135. *Ahuna* v. Dept. of Hawaiian Home Lands, 640 P.2d 1161 (Haw. 1982); *Pele Def. Fund v. Paty*, 837 P.2d 1247 (Haw. 1992).

136. *HCDCH I*, 177 P.3d at 905 (quoting *Ahuna*, 640 P.2d at 1169) (omissions in original).

137. *Id.* at 903-04 (quoting Act of July 1, 1993, No. 359, § 1(9), 1993 Haw. Sess. Laws 1009, 1010) (internal quotation marks omitted). The court also found support for its decision in a 1997 law designed to clarify the proper management of lands in the public land trust, and another 1993 law requiring that the island of Kaho'olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future. *Id.* at 904.



ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts.”<sup>138</sup> Notably, the Hawai‘i Supreme Court recognized that the ‘āina (land) is not fungible or replaceable and holds unique cultural, spiritual, and political significance for Native Hawaiians, citing the trial court’s decision:

*‘Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The ‘aina is part of their ‘ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment [are] alive, respected, treasured, praised, and even worshiped.*<sup>139</sup>

The State, in a controversial move that brought protests from both the Native Hawaiian and general community,<sup>140</sup> sought U.S. Supreme Court review.<sup>141</sup> Although never previously making the argument, in its brief on the merits, the State contended that any claim to title by Native Hawaiians had been extinguished by the Joint Resolution of Annexation, the Organic Act, and the Admission Act.<sup>142</sup>

In 2009, the U.S. Supreme Court reversed and remanded in *Hawaii v. Office of Hawaiian Affairs*.<sup>143</sup> The Court examined the Apology Resolution’s two substantive provisions and their effect on the State’s control over land transfers. The Court

138. *Id.* at 924.

139. *Id.* (emphasis in original).

140. See Lisa Asato, *Youth Uprising: Ceded Lands Case Spurs New Generation of Hawaiian Leaders*, 26 KA WAI OLA, No. 1, 2009, [www.oha.org/kwo/2009/01/story01.php](http://www.oha.org/kwo/2009/01/story01.php); *Groups Oppose Ceded-Land Appeal*, HONOLULU ADVERTISER, Nov. 24, 2008, [the.honoluluadvertiser.com/article/2008/Nov/24/br/hawaii81124053.html](http://the.honoluluadvertiser.com/article/2008/Nov/24/br/hawaii81124053.html); Press Release, Native Hawaiian Bar Association (Nov. 21, 2008), available at <http://www.stopsellingcededlands.com/hawaiian-ceded-lands-media.php> (follow “Press Release 11/21/2008 from the Native Hawaiian Bar Association” hyperlink) (last visited Mar. 3, 2012); Press Release, Council for Native Hawaiian Advancement, Lawsuits and Legislation (Oct. 24, 2008), available at <http://www.stopsellingcededlands.com/hawaiian-ceded-lands-media.php> (follow “Press Release 10/24/2008 from the Council for Native Hawaiian Advancement” hyperlink); see also Lawrence K. Araki, Commentary, *Ceded Land Stance Ignores Moral Obligation*, HONOLULU ADVERTISER, Dec. 18, 2008, [the.honoluluadvertiser.com/article/2008/Dec/18/op/hawaii812180301.html](http://the.honoluluadvertiser.com/article/2008/Dec/18/op/hawaii812180301.html).

141. Brief for Petitioners, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (No. 07-1372), 2008 WL 5150171.

142. *Id.* at 19. In its merits brief, the State argued:

The [Hawai‘i Supreme Court] enjoined any sales of the ceded lands on the theory that title might actually belong not to the State, but to “the Native Hawaiian people.” But that legal theory runs headlong into the Newlands Resolution, which vests absolute and unreviewable title in the United States; the Organic Act of 1900, which confirms the extinguishment of any Native Hawaiian or other claims to the ceded lands; and the Admission Act of 1959, which transfers to the State the same absolute title previously held by the United States. This body of federal law forecloses any competing claims to the ceded lands, such as those respondents present here. It similarly bars any judicial remedy that, like this injunction, is premised on the possible validity of such competing claims.

*Id.*

143. *Office of Hawaiian Affairs*, 556 U.S. at 177. The Court first determined that a federal question existed, pointing out that the Hawai‘i Supreme Court’s opinion was replete with language that linked its reasoning and judgment to the Apology Resolution, thus making it impossible to deny “that the decision below rested on federal law.” *Id.* at 172.

characterized the first provision containing the apology as a mere declaration of political sentiment;<sup>144</sup> stating that its conciliatory or precatory language could not change substantive rights, “especially those that are enforceable against the cosovereign States.”<sup>145</sup> Moreover, according to the U.S. Supreme Court, the Hawai‘i Supreme Court had misinterpreted the second substantive provision, which declares that nothing in the Resolution is “intended to serve as a settlement of any claims against the United States.”<sup>146</sup> The Hawai‘i Supreme Court had characterized the section as a “congressional recognition — and preservation — of claims *against Hawaii*.”<sup>147</sup> The U.S. Supreme Court rejected this reasoning, finding “no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another.”<sup>148</sup> The Court also found that the Resolution’s thirty-seven “whereas” clauses had no operative effect and could not alter any of the State’s rights and obligations since retroactively clouding the state’s title to lands “would raise grave constitutional concerns.”<sup>149</sup>

The Supreme Court faulted the Hawai‘i Supreme Court’s interpretation of the Apology Resolution,<sup>150</sup> but since the Hawai‘i Supreme Court’s decision was also based on state law, the Court remanded the case.<sup>151</sup> In doing so, the Court acknowledged that it lacked “authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law.”<sup>152</sup>

In May 2009, most of the plaintiffs and the State agreed to dismiss the lawsuit without prejudice, contingent on the enactment of specific legislation.<sup>153</sup> Signed into law that year as Act 176,<sup>154</sup> the new law requires a two-thirds approval by the State Legislature for the transfer of trust and other public lands.<sup>155</sup> Act 176 also requires specific details, to be set forth in a legislative resolution with notice to the Office of Hawaiian Affairs, on any transfer of public trust land.<sup>156</sup>

One plaintiff, Jonathan Kamakawiwo‘ole Osorio, continued to pursue the case in state court, relying on state law instead of the Apology Resolution.<sup>157</sup> After Act 176 became law, the State moved to dismiss Osorio’s appeal, arguing that Osorio lacked

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144. *See id.* at 173.

145. *Id.*

146. *Id.*

147. *Id.* at 174 (emphasis in original).

148. *Id.*

149. *Id.* at 176.

150. *Id.* at 176-77.

151. *Id.* at 177.

152. *Id.*

153. *Hawaii v. Office of Hawaiian Affairs, Settlement Agreement*, May 5, 2009 (on file with author).

154. Act 176’s legislative history is available at *SB1677 SD1 HD2 CD1*, HAWAII STATE LEGISLATURE, [http://www.capitol.hawaii.gov/session2009/lists/measure\\_indiv.aspx?billtype=SB&billnumber=1677](http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=1677) (last visited Mar. 15, 2011).

155. Act of July 13, 2009, No. 176, § 2, 2009 Haw. Sess. Laws 705, 706-07 (codified at HAW. REV. STAT. § 171-64.7) (2010)). Ironically, the land exchange provision in the law, which was at issue in both the *Ulaleo v. Paty* and *Pele Defense Fund v. Paty* cases, continues to require a two-thirds disapproval of either house or a majority disapproval by the entire Legislature. *Id.* § 3 (codified at HAW. REV. STAT. § 171-50(c) (2010)).

156. Act of July 13, 2009, No. 176, § 2, 2009 Haw. Sess. Laws 705, 706-07.

157. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.* (HCDCH II), 219 P.3d 1111, 1113, 1115 (Haw. 2009).

standing to bring his claims.<sup>158</sup> The Hawai‘i Supreme Court, in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai‘i (HCDCH II)*, held that although Osorio did have standing, his claims were not ripe for adjudication.<sup>159</sup>

Section 5(f) of the Admission Act names “the betterment of the conditions of Native Hawaiians, as defined in the [HHCA]” as one of the trust’s purposes.<sup>160</sup> Since HHCA beneficiaries must be of at least fifty percent Hawaiian ancestry, the question before the Hawai‘i Supreme Court was whether Osorio, who is Native Hawaiian but not an eligible HHCA beneficiary, could bring his claims.<sup>161</sup> Article XII, section 4<sup>162</sup> of the State Constitution provides that both “Native Hawaiians *and* the general public”<sup>163</sup> are beneficiaries of the trust lands.<sup>164</sup> Thus, the Hawai‘i Supreme Court held that Osorio had established standing as a member of the general public — he had suffered an injury in fact and “a multiplicity of suits” would be avoided by allowing him to sue.<sup>165</sup> The court reasoned that Osorio, as a member of the general public and trust beneficiary with a “particular and threatened injury based on his Hawaiian cultural and religious” connection to the land, met the injury in fact criteria.<sup>166</sup> Moreover, Osorio’s injuries were traceable to the State’s actions in alienating trust lands; once the lands were “‘alienated from the public lands trust, they [would] be lost forever.’”<sup>167</sup> The court also determined that a multiplicity of suits could be avoided by allowing Osorio to sue, since “the State would be free to dispose of the trust res without the citizens of the State having any recourse,”<sup>168</sup> unless Native Hawaiians and members of the general public have standing as trust beneficiaries.<sup>169</sup> After examining Act 176,<sup>170</sup> however, the Hawai‘i Supreme Court concluded that since no land sales had been approved pursuant to the new law, Osorio’s claims were not ripe.<sup>171</sup>

Whether Act 176 and its super-majority requirement are working to preserve trust

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158. *Id.* at 1115.

159. *Id.* at 1126.

160. *Id.* at 1116 (quoting Section 5(f) of the Admission Act).

161. *Id.*

162. HAW. CONST. art. XII, § 4. Although the court referred to article XII, section 7 of the state constitution, it actually quotes from article XII, section 4 of the constitution.

163. *Id.* (emphasis added). Previous case law had already established that Native Hawaiians as defined in the Hawaiian Homes Commission Act have a right to sue to enforce the § 5(f) trust provision. *HCDCH II*, 219 P.3d at 1119 (citing *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 n.8 (1992) (“The [United States Court of Appeals for the] Ninth Circuit has consistently held that native Hawaiians and native Hawaiian groups have standing to bring claims to enforce the trust provisions of the Admission Act.”); *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir. 1991) (“[P]ersons in the position of these appellants do have standing to challenge the use of section 5(f) lands.”); *Price v. Akaka*, 928 F.2d 824, 826 (9th Cir. 1990) (Native Hawaiians can make allegations sufficient to show that there is an injury in fact even though legitimate section 5(f) uses might not necessarily benefit native Hawaiians.)).

164. *HCDCH II*, 219 P.3d at 1120.

165. *Id.* at 1118 (citing *Akai v. Oloana Corp.*, 652 P.2d 1130, 1134 (Haw. 1982)).

166. *Id.* at 1121.

167. *Id.* (quoting *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. (HCDCH I)*, 177 P.3d 884, 918 (Haw. 2008)).

168. *Id.* at 1122 (citing *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1258 (Haw. 1992)).

169. *Id.*

170. *Id.* at 1124-25.

171. *Id.* at 1126. Citing its decision in *HCDCH I*, the Court explained that for ripeness, “the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention.” *Id.* at 1123.

lands is unclear. In the 2010 legislative session, the Legislature approved 19 of 22 proposed land sales under the super-majority provisions of Act 176.<sup>172</sup> Since Act 176 did not require state agencies to identify whether lands that would be alienated were trust lands, it was uncertain how many, if any, of the 19 parcels were trust lands. In the 2011 Hawai'i Legislature, the Office of Hawaiian Affairs successfully lobbied to amend Act 176 to require that state agencies specifically identify whether a parcel they intend to alienate is part of the trust.<sup>173</sup>

The 2011 Legislature also enacted a measure requiring the relevant agencies to develop an accurate land trust information system.<sup>174</sup> In another move that could have a broad impact on trust lands, the Legislature enacted a law creating a public lands development corporation to allow long-term development on trust lands;<sup>175</sup> the law also appears to exempt such development from many state and county land use and zoning laws.<sup>176</sup>

### *B. Disputes Over Trust Revenues*

Pursuant to the 1978 constitutional amendments, the Office of Hawaiian Affairs ("OHA") should receive the income and proceeds from a pro rata share of the trust lands. In spite of the constitutional mandate and primarily as a result of decades of vigorous advocacy, Native Hawaiians have been only partially successful in the legislature and courts in achieving a consistent and unambiguous revenue stream from the trust lands. In 1980, the state legislature set OHA's pro rata share at twenty percent.<sup>177</sup> Over the years, disputes over the classification of specific parcels of land as "ceded" or non-"ceded", questions as to whether section 5(f) requires gross or net income, and problems in defining "proceeds" have prevented OHA from receiving its appropriate share of public land trust proceeds.<sup>178</sup> Thus far, the Hawai'i Supreme Court has declined to resolve these difficult questions, pointing instead to the legislative process.<sup>179</sup>

Seeking to clarify the lands and revenues included in OHA's twenty percent share, the OHA trustees filed suit. In 1987, the Hawai'i Supreme Court in *Trustees of the Office of Hawaiian Affairs v. Yamasaki* suggested that the relevant statute did not provide adequate detail or standards to determine OHA's pro rata share.<sup>180</sup> The court dismissed OHA's claims under the "political question" doctrine, characterizing the issues to be of a

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172. See Sterling Wong, *2011 Legislative Review*, 28 KA WAI OLA, No. 6, June 2011 at 11, 37, available at <http://www.oha.org/kwo/2011/06/> (last visited Apr. 8, 2012).

173. Act of June 27, 2011, No. 169, § 1, 2011 Haw. Sess. Laws 579.

174. Act of May 20, 2011, No. 54, § 1, 2011 Haw. Sess. Laws.

175. Act of May 20, 2011, No. 55, 2011 Haw. Sess. Laws.

176. *Id.*

177. Act of June 16, 1980, No. 273, 1980 Haw. Sess. Laws 525 (codified at HAW. REV. STAT. § 10-13.5 (2009)).

178. See HAW. LEGISLATIVE AUDITOR, *supra* note 104, at 109 (indicating that if one category of disputed lands had been included in the trust, revenues to OHA would have increased by \$1.7 million a year).

179. See *infra* pp. 635-38 for a discussion of Office of Hawaiian Affairs v. Haw. State Legislature, 2010 Haw. LEXIS 184 (Haw. Aug. 18, 2010); Office of Hawaiian Affairs v. State (OHA II), 133 P.3d 767 (Haw. 2006); Office of Hawaiian Affairs v. State (OHA I), 31 P.3d 901 (Haw. 2001).

180. See Trs. of Office of Hawaiian Affairs v. Yamasaki, 737 P.2d 446, 457 (Haw. 1987).

“peculiarly political nature and therefore not meet for judicial determination.”<sup>181</sup>

In 1990, OHA and the State settled the revenue dispute as embodied in Act 304,<sup>182</sup> defining both the trust res and trust revenues.<sup>183</sup> Act 304 segregated revenue from the “actual use” or disposition of trust lands into two categories — sovereign and proprietary revenue.<sup>184</sup> OHA would not receive revenue — such as taxes, fines, and federal grants or subsidies — generated from the exercise of State sovereign powers.<sup>185</sup> Proprietary revenue, such as rents, leases, and licenses, would be subject to OHA’s pro rata share.<sup>186</sup>

Even after the passage of Act 304, some issues remained unresolved.<sup>187</sup> In 1994, OHA returned to state court seeking an accounting and restitution of a pro rata portion of disputed trust revenues.<sup>188</sup> The disputed revenues included lease payments from Honolulu International Airport’s duty-free concession agreements, including payments based on receipts from the Waikīkī duty-free store, and other proceeds and rents.<sup>189</sup> On preliminary motions, the trial court found in favor of OHA, and the State appealed to the Hawai‘i Supreme Court.<sup>190</sup>

While the case was on appeal, Congress passed the 1998 “Forgiveness Act,” waiving repayment of past diversions from airport revenues made for the betterment of Native Hawaiians and forbidding any further payments.<sup>191</sup> The Forgiveness Act also stated that nothing in its terms should be construed to affect trust obligations or state statutes defining the obligations to Native Hawaiians.<sup>192</sup>

In 2001, the Hawai‘i Supreme Court decided *Office of Hawaiian Affairs v. State (OHA I)*, first holding that Act 304 required airport revenues, including concessionaire rent and fees, be paid to OHA.<sup>193</sup> The court examined the plain language of Act 304’s definition of revenue, which included “rents . . . derived from any . . . lease result[ing] from the actual use of [trust] lands.”<sup>194</sup> After analyzing the agreement between the duty-free store and the State, the court concluded that the rent paid by the duty-free store, even for merchandise sold off-premises in Waikīkī but picked up at the airport, was for the “actual use” of the airport premises.<sup>195</sup>

181. *Id.* at 458 (quoting *Colegrove v. Green*, 328 U.S. 549, 552 (1946)).

182. *See* Act of July 3, 1990, No. 304, 1990 Haw. Sess. Laws 947.

183. *Id.* § 3.

184. *Id.*

185. *Id.*

186. *Id.*

187. Paragraph 7 of the agreement between OHA and the Office of State Planning (OSP), which represented the State in the negotiations, acknowledges that the settled amount “does not include several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted and agreed to.” Memorandum of Understanding at 9 (April 28, 1993) (on file with author).

188. *Office of Hawaiian Affairs v. State (OHA I)*, 31 P.3d 901, 905 (Haw. 2001).

189. *Id.* OHA sought its pro rata share of revenues from “(1) Waikiki Duty Free receipts (in connection with the lease of ceded lands at the Honolulu International Airport); (2) Hilo Hospital patient services receipts; (3) receipts from the Hawaii Housing Authority and the Housing Finance and Development Corporation for projects situated on ceded lands; and (4) interest earned on withheld revenues.” *Id.*

190. *Id.* at 902.

191. Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, § 340 (b)-(c), 111 Stat. 1425, 1448 (1997).

192. *Id.* § 340(d).

193. *OHA I*, 31 P.3d at 908-09.

194. *Id.* at 908 (citations omitted).

195. *Id.*

Although validating OHA's underlying claim, the Hawai'i Supreme Court then considered whether the Forgiveness Act's prohibition *against* payment from airport revenues conflicted with Act 304's requirement that airport revenues be paid to OHA.<sup>196</sup> OHA argued that a savings clause in the Forgiveness Act required the State to pay the airport revenue from another fund.<sup>197</sup> The court rejected OHA's argument, concluding that "the savings clause provides that state statutes shall not be interfered with, *except* where those statutes provide for payment of airport revenues to satisfy the State's obligations. Because Act 304 obligates the State to pay airport revenues to OHA in this case, the savings clause cannot 'save' Act 304."<sup>198</sup>

OHA also pointed to state law giving OHA trustees the power to "[m]anage, invest, and administer . . . income . . . *equivalent to* [the] pro rata portion"<sup>199</sup> derived from the public land trust and another provision that contained similar language<sup>200</sup> to argue that the State had the ability to pay OHA "equivalent" amounts.<sup>201</sup> The court made short shrift of this argument, concluding that an express and clear statement by the legislature was required — a statement not found in Act 304 or its legislative history — to "appropriate" funds from other sources to OHA.<sup>202</sup>

Act 304 contained a non-severability clause; any provision held to be in conflict with federal law would invalidate the entire act.<sup>203</sup> Moreover, if Act 304 was invalidated, the immediately preceding version of state law on OHA's pro rata share would be reinstated.<sup>204</sup> The Hawai'i Supreme Court held that Act 304 was invalid, and the prior state law, the law previously found invalid in the *Yamasaki* case, was automatically reinstated.<sup>205</sup> The court then determined that the case presented a non-justiciable political question.<sup>206</sup>

Even in invalidating Act 304, the court recognized that the State's constitutional obligation to Native Hawaiians, stating "it is incumbent upon the legislature to enact legislation that gives effect to the right of [N]ative Hawaiians to benefit from the ceded lands trust."<sup>207</sup>

196. *Id.* at 910.

197. *Id.* The savings clause stated, "Nothing in this Act shall be construed to affect any existing . . . statute . . . that defined the obligations of [the State] to native Hawaiians in connection with ceded lands, *except to make clear that airport revenues may not be used to satisfy such obligations.*" *Id.* (citing Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, § 340(d), 111 Stat. 1425, 1448 (1997)).

198. *OHA I*, 31 P.3d at 911.

199. *Id.* (quoting HAW. REV. STAT. § 10-5(1) (1993)).

200. *Id.* HAW. REV. STAT. § 10-13(b) (1993), as amended by Act 304, also used similar "equivalent to" language and was cited in *OHA I*, 31 P.3d at 907.

201. *OHA I*, 31 P.3d at 911.

202. *Id.* at 911-12.

203. Act of July 3, 1990, No. 304, § 16, 1990 Haw. Sess. Laws 947, 953.

204. *Id.*

205. *OHA I*, 31 P.3d at 912.

206. *Id.* at 914.

207. *Id.* Immediately after the Hawai'i Supreme Court's decision in *OHA I*, the State stopped all trust land revenue payments to OHA. See Debra Barayuga, *OHA Sues to Resume Land Revenues*, STARBULLETIN.COM, July 22, 2003, archives.starbulletin.com/2003/07/22/news/story5.html. Soon after Governor Linda Lingle took office in 2003, she issued an executive order restoring trust land revenue payments to OHA. Executive Order 03-03 (Feb. 11, 2003) (on file with author). The 2003 Hawai'i State Legislature appropriated funds for back payments to OHA for the revenue that was discontinued after the *OHA I* decision. Act of April 23, 2003, No.

OHA has made two additional attempts to have the Hawai‘i Supreme Court intervene in the revenue dispute. In 2003, OHA brought suit, contending that Act 304 constituted a contract between the State and OHA that had been breached.<sup>208</sup> OHA also argued that the State breached its fiduciary duties by not challenging a Federal Aviation Administration memorandum leading to the passage of the Forgiveness Act (and the invalidation of Act 304), and by failing to inform OHA of these relevant facts.<sup>209</sup>

In *Office of Hawaiian Affairs v. State (OHA II)*, the Hawai‘i Supreme Court held that Act 304 did not evidence a legislative intent to create a contract.<sup>210</sup> With regard to the claim that the State had breached its trust duty to deal impartially with beneficiaries and to inform OHA of its actions in response to the FAA’s position on airport revenues, the court determined that OHA could have brought its breach of trust claims under the proper circumstances.<sup>211</sup> OHA, however, had failed to follow the statute’s notice requirements; in addition, the two-year statute of limitations period had expired.<sup>212</sup>

While finding OHA’s breach of trust claims barred, the court again called upon the Legislature to implement the state constitution’s trust provisions. The court quoted U.S. Senator Daniel Inouye’s floor speech during debates on the Forgiveness Act stating, “[I]n light of the unique history of Hawai‘i’s ceded lands and the obligations that flow from these lands for the betterment of the Native Hawaiian people . . . *this is more than a fiscal matter, this is a fiduciary matter—one of trust and obligation.*”<sup>213</sup>

OHA’s second attempt to get the judiciary to intervene in the revenue dispute took the form of a mandamus petition to the Hawai‘i Supreme Court. OHA asked the court to require the 2011 State Legislature to clarify the amount of past due trust lands revenue to be transferred to OHA.<sup>214</sup> The Hawai‘i Supreme Court summarily denied the petition<sup>215</sup> because OHA had “[failed] to demonstrate a clear and indisputable right” to relief.<sup>216</sup> For OHA to prevail, the Legislature’s duty should have been described “‘with such precision and certainty as to leave nothing to the exercise of discretion or judgment.’”<sup>217</sup>

After several failed attempts, in 2012 all claims for *back revenue*, from the date of OHA’s establishment in 1978 through June 30, 2012, were settled by the State’s

34, 2003 Haw. Sess. Laws 46.

208. *Office of Hawaiian Affairs v. State (OHA II)*, 133 P.3d 767, 774-76 (Haw. 2006)

209. *Id.* at 783-84.

210. *Id.* at 783.

211. *Id.* at 784-85; see HAW. REV. STAT. § 673-1 (2010). The State contended that Hawai‘i Revised Statutes section 673-9, which provides that chapter 673 “shall not apply to suits in equity or law brought by or on behalf of [OHA] in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to [OHA] by the legislature,” barred OHA’s suit. *OHA II*, 133 P.3d at 787. The court held, however, that the action “[did] not involve the proportionate share of OHA’s revenues,” since that amount had been set by the legislature. *Id.* The court determined that the “damages resulting [are] from the State’s breach of trust duties and do not require a determination of OHA’s proportionate share of revenues.” *Id.*

212. *Id.* at 787-88. The court rejected OHA’s argument that the two-year statute of limitations did not apply to OHA as a state entity since, under state law, OHA is entitled to sue, and did in fact sue, in OHA’s corporate capacity, *not* as a state entity. *Id.* at 788-89.

213. *Id.* at 796 (emphasis in original).

214. Petition for Writ of Mandamus, *Office of Hawaiian Affairs v. Haw. State Legislature*, No. 30535 (Haw. June 2, 2010) (on file with author).

215. *Office of Hawaiian Affairs v. Haw. State Legislature*, No. 30535, 2010 WL 3262722, at \*1 (Haw. Aug. 18, 2010).

216. *Id.*

217. *Id.* at \*1 (citation omitted).

conveyance to OHA of 10 parcels of land in Honolulu's waterfront area.<sup>218</sup> In 2006, the Legislature had set an interim revenue amount of \$15.1 million annually to be transferred to OHA from the public land trust.<sup>219</sup> OHA continues to receive \$15.1 million per year in lieu of the pro rata share required by the State Constitution.<sup>220</sup> Thus, although there has been progress in resolving the trust revenue dispute, OHA's true pro rata share of future revenue remains unresolved.

#### IV. TRANSLATING CULTURAL SOVEREIGNTY INTO LAW

Controversies between Native Hawaiians and the State over trust lands and resources will undoubtedly continue. Whether the new State Recognition Act becomes a galvanizing point for another form of controversy or marks the beginning of a true reconciliation process is unclear. Despite the success or failure of the state recognition process, and whether or not a federal recognition bill is ever enacted into law, Native Hawaiians will continue to exist as a unique and distinct people.

Native Hawaiian scholar, Davianna Pōmaika'i McGregor, has published a book celebrating the *kua'āina* — in Hawaiian *kua* means back or backbone and *'āina* is the term for land.<sup>221</sup> *Ku'āina* is sometimes translated as “country folk” or, in a derogatory sense, someone who is backward and unsophisticated. Professor McGregor, however, explains that *kua'āina* are those who embody the backbone of the land; it is the *kua'āina* who have kept the Hawaiian people strong:

Indeed, *kua'āina* are the Native Hawaiians who remained in the rural communities of our islands, took care of the *kūpuna* or elders, continued to speak Hawaiian, bent their backs and worked and sweated in the taro patches and sweet potato fields, and held that which is precious and sacred in the culture in their care. . . . [T]he life ways of the *kua'āina* enabled the Native Hawaiian people to endure as a unique, distinct, dignified people even after over a century of American control of the Islands.<sup>222</sup>

The *kua'āina* are at the very core of cultural sovereignty. As Professor Tsosie and Chairman Coffey have written, cultural sovereignty is “the effort of [Native] nations and [Native] people to exercise their own norms and values in structuring their collective futures.”<sup>223</sup> Tsosie and Coffey tie cultural sovereignty to the inherent sovereignty of Native societies:

Inherent sovereignty is not dependent upon any grant, gift or acknowledgment

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218. The settlement is embodied in Act of April 11, 2012, No. 15, 2012. Between 2009 and 2011, efforts to resolve the revenue dispute failed in the legislature. *See, e.g.*, H.B. 266 & S.B. 2733, 24th Leg., Reg. Sess. (Haw. 2008); H.B. 901 & S.B. 995, 25th Leg., Reg. Sess. (Haw. 2009); H.B. 399 & S.B. 984, 26th Leg., Reg. Sess. (Haw. 2011).

219. Act of June 7, 2006, No. 178, 2006 Haw. Sess. Laws 702. Act 178 also authorized a one-time payment of \$17.5 million for prior underpayments and contained a disclaimer clause stating, “[n]othing in this Act shall resolve or settle, or be deemed to acknowledge the existence of, the claims of Native Hawaiians to the income and proceeds of a pro rata portion of the public land trust.” *Id.* §§ 4, 7.

220. *Id.* § 2.

221. MCGREGOR, *supra* note 46, at 2.

222. *Id.* at 4.

223. Coffey & Tsosie, *supra* note 12, at 196.



by the federal government. It preexists the arrival of the European people and the formation of the United States. Cultural sovereignty is inherent in every sense of that word, and it is up to [Native] people to define, assert, protect, and insist upon respect for that right.<sup>224</sup>

Native Hawaiian sovereignty, then, must be defined from “within” Native Hawaiian culture. As the following section highlights, Native Hawaiians — led and inspired by *kua‘āina* — have reclaimed and restored the cultural norms, values, and practices that lead to and express cultural sovereignty. These expressions of cultural sovereignty, in turn, have resulted in changes in the law and legal processes that have increased Native Hawaiian political sovereignty.

#### *A. Regaining Hawaiian Lands*<sup>225</sup>

An ancient Hawaiian proverb describes the inseparable connection between Native Hawaiians and their land: “*Hānau ka ‘āina, hānau ke ali‘i, hānau ke kanaka. Born was the land, born were the chiefs, born were the common people.*”<sup>226</sup>

Native Hawaiians, like many native peoples, “see an interdependent, reciprocal relationship between the gods, the land, and the people” — indeed, Native Hawaiians trace their genealogy to *Papa*, the earth mother, and *Wākea*, the sky father.<sup>227</sup> Native Hawaiians are related to their *‘āina*, to the natural forces of the world, and to *kalo* or *taro*, the staple food of the Hawaiian people. All are connected in a deep and profound way that infuses Hawaiian thought and is expressed in all facets of Hawaiian life.<sup>228</sup> Thus, the principle of *mālama ‘āina* (to take care of the land) is directly linked to conserving and protecting not only the land and its resources, but also humankind and the spiritual world.

In spite of being alienated from their land by over a century of colonial domination, Native Hawaiians, in partnership with others, are regaining control over the management of their lands and natural resources. Wao Kele o Puna rainforest on the Island of Hawai‘i was successfully returned to Native Hawaiians after a more than twenty-year legal and political battle resulting from a private company’s attempts to drill for geothermal energy on the land. Waimea Valley, a lush and culturally-rich *ahupua‘a* on the north shore of O‘ahu — originally managed by high-ranking Hawaiian priests, but more recently threatened with subdivision into luxury-home lots — has returned to Native Hawaiian ownership through OHA.<sup>229</sup> Probably the most renowned example is the return of the Island of Kaho‘olawe to the stewardship of the Native Hawaiian people after nearly fifty years of U.S. military live-fire bombing.<sup>230</sup> In all three instances,

224. *Id.*

225. The material in this section is based on Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV’T 37 (2007).

226. MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 56 (1983).

227. MacKenzie et al., *supra* note 225, at 37; MCGREGOR, *supra* note 46, at 13.

228. MCGREGOR, *supra* note 46, at 13-14.

229. MacKenzie et al., *supra* note 225, at 40-41; *see also* *Hi‘ipaka LLC*, WAIMEA VALLEY, [http://www.waimeavalley.net/waimea\\_valley.aspx](http://www.waimeavalley.net/waimea_valley.aspx) (last visited on Mar. 3, 2012).

230. *See* *Hanau hou he ‘ula ‘o Kaho‘olawe - Rebirth of a Sacred Island*, KAHO‘OLAWA ISLAND RES. COMMISSION, <http://kahoolawe.hawaii.gov/history.shtml> (last visited Mar. 18, 2012); *see also* Coffey &

Native Hawaiians are protecting both natural and cultural resources, and ensuring that Native Hawaiian traditional and customary activities can be practiced on those lands.

In Wao Kele o Puna,<sup>231</sup> a nearly 26,000 acre native rainforest on the flanks of Kīlauea Volcano, three important factors converged — the spiritual and religious importance of the area as the home of *Pele*, the Hawaiian deity of fire and the volcanoes; the use of Wao Kele o Puna for traditional subsistence, cultural, and religious purposes; and the classification of these lands as Government Lands in the Māhele.

The legal controversy over Wao Kele o Puna began in the early 1980s when a large landowner, Campbell Estate, sought to develop geothermal energy on Kahauale’a, nearly 25,800 acres of conservation land adjacent to Volcanoes National Park and upland from Wao Kele o Puna.<sup>232</sup> When lava flows overran Kahauale’a, making geothermal development untenable, Campbell Estate and the State proposed an exchange of Kahauale’a lands for Wao Kele o Puna and part of the Puna Forest Reserve.<sup>233</sup> This was a shocking proposal, since under state law, Wao Kele o Puna was classified as a Natural Area Reserve, a pristine area supporting “unique natural resources” to be preserved in perpetuity.<sup>234</sup>

Moreover, Native Hawaiians, and in particular those who honor or are genealogically connected to *Pele* and her ‘ohana (extended family), believe that geothermal drilling desecrates *Pele*’s body and takes her energy and lifeblood.<sup>235</sup> In hearings on geothermal development in Wao Kele o Puna, individual *Pele* practitioners challenged the proposal on First Amendment free exercise of religion grounds.<sup>236</sup> The Hawai’i Supreme Court in *Dedman v. Board of Land and Natural Resources*, although acknowledging the sincerity of the religious claims, concluded that absent proof that religious ceremonies were held in the specific area of development, there was no burden on the exercise of religion.<sup>237</sup>

As discussed previously, the *Pele* Defense Fund, including *Pele* practitioners and Native Hawaiians living in *ahupua’a* (traditional land units extending from the mountaintops down ridges spreading out at the base along the seashore and containing within it most of the resources necessary for subsistence)<sup>238</sup> adjacent to Wao Kele o Puna, then brought suit in federal court challenging the land exchange.<sup>239</sup> Ultimately, in *Ulaleo v. Paty*, the Ninth Circuit Court of Appeals held that the suit was barred by the state’s Eleventh Amendment sovereign immunity.<sup>240</sup>

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Tsosie, *supra* note 12, at 206; MCGREGOR, *supra* note 46, at 249-85.

231. The larger parcel at issue in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), and *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992), included both Wao Kele o Puna and other lands in the Puna area of Hawai’i Island.

232. See *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1253 (Haw. 1992), *Dedman v. Bd. of Land & Natural Res.*, 740 P.2d 28 (Haw. 1987).

233. *Id.* at 30-31.

234. See HAW. REV. STAT. §195-1 (2010).

235. *Dedman*, 740 P.2d at 32.

236. *Id.* at 32-33.

237. *Id.* at 33.

238. *In re Boundaries of Pulehunui*, 4 Haw. 239, 239-42 (Haw. 1879).

239. *Ulaleo v. Paty*, 902 F.2d 1395, 1396 (9th Cir. 1990).

240. See *id.* at 1399-1400.

PDF's challenge to the land exchange in state court also failed.<sup>241</sup> Nevertheless, the case was an important victory for Native Hawaiians who use Wao Kele o Puna for hunting, gathering, and religious and cultural purposes. The Hawai'i Supreme Court recognized that customary and traditional rights, which had been limited by residency within an *ahupua'a*, could be exercised for subsistence, cultural, and religious purposes, and on undeveloped lands beyond the boundaries of the *ahupua'a* of residence where "such rights have been customarily and traditionally exercised in this manner."<sup>242</sup> On remand to the trial court, PDF members were able to prove their subsistence, cultural, and religious practices in Wao Kele o Puna — beyond the boundaries of the *ahupua'a* in which they actually resided — in accordance with ancient custom and tradition.<sup>243</sup>

Civil disobedience and protest were also part of the movement to stop geothermal development in Wao Kele o Puna.<sup>244</sup> In March 1990, more than a hundred people were arrested out of a thousand protestors who marched to the locked gates of the geothermal well site at Wao Kele o Puna.<sup>245</sup> Even with significant federal and state support, geothermal development was an economic failure. The project was abandoned<sup>246</sup> and in 2001, Campbell Estate announced its intent to sell Wao Kele o Puna.

The Pele Defense Fund approached the Trust for Public Land, a national nonprofit land conservation organization, which took up the cause and worked with the state Department of Land and Natural Resources ("DLNR") over several years to get substantial funding from the federal Forest Legacy Program to purchase of Wao Kele o Puna.<sup>247</sup> The Office of Hawaiian Affairs ("OHA") stepped forward with the final necessary funding.<sup>248</sup> The three groups reached a landmark agreement under which OHA would receive title to Wao Kele o Puna. The Trust for Public Land negotiated the sale and purchase of the land from Campbell Estate, and then conveyed Wao Kele o Puna to OHA in July 2006.<sup>249</sup> Under state law OHA is able to hold title to lands,<sup>250</sup> but it has never had a land base and lacks land management experience. Thus, under a memorandum of agreement reached by OHA and DLNR, both agencies, along with the

241. *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1272-73 (Haw. 1992).

242. *Id.* at 1272.

243. *See* Final Judgment at 2, *Pele Def. Fund v. Estate of Campbell*, Civ. No. 89-089 (Haw. 3d Cir. 2002) (on file with the author).

244. In 1991, the Hawai'i Supreme Court reviewed a group of trespass convictions arising out of Native Hawaiian protests over geothermal development in Wao Kele O Puna. *See* *State v. McGregor*, S. Ct. No. 14985 (Sept. 26, 1991). In a series of memorandum opinions, which have no precedential effect, the court "gave little credence to arguments that the geothermal developer violated the defendants' free exercise of religion by prohibiting access to the development site." Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377, 391 (1992). "The defendants wished to conduct a religious ceremony at the site to heal damage to Pele caused by geothermal drilling." *Id.* Other efforts to stop geothermal development included challenges to the permitting process. *See, e.g., Pele Def. Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1211-12 (Haw. 1994).

245. *See* Teresa Dawson, *Hawaiian, State Agencies Race to Reclaim Wao Kele O Puna from Campbell Estate*, 16 ENV'T HAWAII, No. 4, Oct. 2005, at 5.

246. *Id.*

247. Curt Sanburn, *Protecting Pele's Forest—Land & People*, LAND & PEOPLE, Nov. 1, 2006, available at <http://www.tpl.org/publications/land-and-people-magazine/archive/landpeople-fall-2006/protecting-peles-forest.html> (last visited Mar. 3, 2012).

248. *See* HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. § 10 (2009).

249. Sanburn, *supra* note 247.

250. HAW. REV. STAT. § 10-4(2) (2009).

surrounding communities, manage the forest in partnership until OHA is ready to assume total management responsibility.<sup>251</sup> The agreement governing Wao Kele o Puna is an “unprecedented document,” with DLNR providing its land-management experience and OHA bringing its cultural expertise.<sup>252</sup> The memorandum of agreement contemplates that DLNR and OHA will develop a “comprehensive management plan” with community input, have the land designated as a forest reserve and remove the geothermal subzone designation, and ultimately transfer title to OHA.<sup>253</sup>

Hailed as the first return of “ceded” lands to Native Hawaiian ownership since the 1893 overthrow of the Hawaiian Kingdom, many see Wao Kele o Puna as the foundation of a land base for a future Native Hawaiian nation.<sup>254</sup> Equally important is the role that Native Hawaiians have played in reclaiming Wao Kele o Puna as a place where indigenous customs, traditions, and religion remain intact. Palikapu Dedman, of the Pele Defense Fund, acknowledged at a dedication ceremony for Wao Kele o Puna:

It’s been a real emotional journey, and I feel real proud about how far we’ve come as Native Hawaiians. . . . But we gotta grow on this; we have to stand up for ourselves and keep doing what we’re doing, and if government’s gonna have to catch up, they’re gonna have to catch up. But we’ll still have to be there to remind them of their responsibility to indigenous people.<sup>255</sup>

While Native Hawaiian endeavors to regain lands help to preserve Hawai‘i’s natural environment, they are also hard-fought efforts to restore to Native Hawaiians a measure of self-determination. The example set by Palikapu Dedman, the Pele Defense Fund members, and all of the *kua‘āina* involved in these efforts to reclaim native lands is a true exercise of cultural and political sovereignty.<sup>256</sup>

### *B. Reclaiming Native Hawaiian Traditional Practices*

Hawaiian customary practices, particularly those related to land, have been recognized under Hawai‘i law since the mid-1800s. In the Māhele process, Native Hawaiian tenants could claim title to their house lots, plus lands under cultivation. These lots are called *kuleana* — meaning “right,” “title,” “portion”<sup>257</sup> — and the law that allowed native tenants to claim their land is called the Kuleana Act.<sup>258</sup> Over the years, every section of the Kuleana Act has been repealed with the exception of section 7,

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251. See Kekoa Enomoto, *Bringing Pono to Wao Kele o Puna*, 28 KA WAI OLA, No. 9, Sept. 2011, at 16-17, available at <http://www.oha.org/kwo/2011/09/KWO1109.pdf>.

252. *Id.*

253. *Id.*

254. See Sanburn, *supra* note 247.

255. *Return to Wao Kele*, 24 KA WAI OLA, No. 10, Oct. 2007, at 12, 13.

256. Since the 2007 transfer, OHA and DLNR have worked closely to manage Wao Kele o Puna according to the memorandum of agreement. The geothermal wells on the site have been plugged and OHA is working to remove the geothermal subzone designation from the land. An initial community meeting has resulted in the first stages of a community advisory council to help shape the future of Wao Kele o Puna. E-mail from L. Koalani Kaulukukui, Land Management Specialist, Office of Hawaiian Affairs, Land and Property Management, to author (Aug. 18, 2011) (on file with author).

257. PUKUI & ELBERT, *supra* note 1, at 165.

258. Act of Aug. 6, 1850, Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands (1850).

which provides, in part:

[T]he people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple . . . .<sup>259</sup>

The legislative history of the Kuleana Act shows that this section was included by King Kamehameha III because of his concern that “a little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value.”<sup>260</sup> The Privy Council Minutes indicate: “[T]he proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to.”<sup>261</sup>

A second basis for customary and traditional rights is found in the “Hawaiian usage” exception set forth in Hawai‘i Revised Statutes section 1–1.<sup>262</sup> This section adopts the common law, “except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, *or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . .*”<sup>263</sup> Hawai‘i courts have held that since this section is derived from an act approved on November 25, 1892, the “Hawaiian usage” is usage that predates November 25, 1892.<sup>264</sup>

In 1978, Article XII, § 7, was added to the State Constitution specifically recognizing traditional and customary Hawaiian practices. Although this provision was voted on and adopted by all voters in the State, this was a Native Hawaiian initiative, proposed by Hawaiian people and moved through the Constitutional Convention process by Hawaiians with the support of sympathetic non-Hawaiians.

This provision states: “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”<sup>265</sup>

The Committee Reports and Constitutional Convention debates on the amendment indicate that the provision was intended to be broadly construed and to cover a wide-range of customary rights. Delegates to the 1978 Hawai‘i Constitutional Convention proposing this amendment declared:

The proposed new section reaffirms *all* rights customarily and traditionally held by ancient Hawaiians. . . . [B]esides fishing rights, other rights for sustenance, cultural and religious purposes exist. Hunting, gathering, access

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259. HAW. REV. STAT. § 7–1 (2010).

260. 3B PRIVY COUNCIL RECORDS 681, 713 (1850).

261. *Id.* at 763.

262. *See* HAW. REV. STAT. § 1–1 (2010).

263. *Id.* (emphasis added).

264. *State v. Zimring*, 479 P.2d 202, 204 (Haw. 1970).

265. HAW. CONST. art. XII, §7.

and water rights . . . were . . . an integral part of the ancient Hawaiian civilization and are retained by its descendants.<sup>266</sup>

This provision was not meant to “remove or eliminate any statutorily recognized rights or any rights of native Hawaiians” but was intended to “encompass all rights of native Hawaiians, such as access and gathering.”<sup>267</sup>

In a series of cases — cases brought by Native Hawaiians, *kua‘āina* engaged in customary practices who wished to gather items necessary for subsistence, religious or cultural purposes — the Hawai‘i Supreme Court has interpreted these three laws in relation to Native Hawaiian access and gathering practices.<sup>268</sup>

In *Kalipi v. Hawaiian Trust Co.*, the court held that gathering rights derive from both Hawai‘i Revised Statutes §§ 7-1 and 1-1, but that three conditions must be met in order to validate a right to gather the items enumerated in § 7-1: (1) the tenant must physically reside within the *ahupua‘a* from which the item is being gathered; (2) the right to gather can only be exercised upon undeveloped lands within an *ahupua‘a*; and (3) the right must be exercised for the purpose of practicing Native Hawaiian customs and traditions.<sup>269</sup> Although the court ultimately found that the plaintiff in *Kalipi* did not have customary gathering rights because he was not a resident of the relevant *ahupua‘a*, the court, in very forceful language, acknowledged its “obligation to preserve and enforce such traditional rights [as] a part of our Hawaii State Constitution.”<sup>270</sup>

The court also recognized that § 1-1 ensures that other Native Hawaiian customs and practices not specifically enumerated in § 7-1 may continue “so long as no actual harm is done thereby.”<sup>271</sup> It adopted a balancing test in which “the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.”<sup>272</sup>

As discussed earlier, in the 1995 *Pele Defense Fund* case, the Hawai‘i Supreme Court expanded *Kalipi* and held that customary and traditional rights could be exercised for subsistence, cultural, and religious purposes, on undeveloped lands *beyond* the boundaries of a tenant’s *ahupua‘a* of residence if that was the customary practice in a given area.<sup>273</sup>

Three years later in *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission* (“PASH”),<sup>274</sup> the Hawai‘i Supreme Court concluded that since Hawaiian custom and usage were underlying principles at the time of the Māhele, “the western

266. *Stand. Comm. Rep. No. 57*, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637, 640 (1980) (emphasis added).

267. *Id.*

268. *See, e.g.,* McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973); Palama v. Sheehan, 440 P.2d 95 (Haw. 1968).

269. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 749-50 (Haw. 1982).

270. *Id.* at 748.

271. *Id.* at 751.

272. *Id.*

273. *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1272 (Haw. 1992).

274. *Pub. Access Shoreline Hawaii v. Hawai‘i Cnty. Planning Comm’n (PASH)*, 903 P.2d 1246 (Haw. 1995).

concept of exclusivity [in property] is not universally applicable in Hawai‘i.”<sup>275</sup> Thus, the original land patents issued in Hawaii “confirmed a limited property interest [when] compared with typical [Western] land patents” and property rights.<sup>276</sup>

The court traced the origins of the Hawaiian usage exception in Hawai‘i Revised Statutes § 1–1 back to an 1847 law,<sup>277</sup> which allowed the adoption of common law principles that were “not in conflict with the laws and usages of this kingdom.”<sup>278</sup> The *PASH* court further stressed that, “[t]he precise nature and scope of the rights retained by § 1–1 . . . depend upon the particular circumstances of each case.”<sup>279</sup>

The court also distinguished the doctrine of custom in Hawai‘i in several ways. First, contrary to the “time immemorial” standard used by English and American common law, traditional and customary practices in Hawaii must be established in practice by November 25, 1892.<sup>280</sup> Second, continuous exercise of the right is not required, although the custom may become more difficult to prove.<sup>281</sup> Moreover, the *PASH* court stated, “[t]he right of each ahupua‘a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site.”<sup>282</sup>

The court also rejected the argument that when a landowner develops land, gathering rights disappear, holding instead that “the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.”<sup>283</sup> The court believed that the State has the authority to reconcile competing interests;<sup>284</sup> thus, “[d]epending on the circumstances of each case, once land has reached the point of ‘full development’ it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property.”<sup>285</sup> The *PASH* court, however, clearly stated that “[a]lthough access is only *guaranteed* in connection with undeveloped lands, and [the Hawai‘i Constitution] does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the[se] rights . . . out of existence.”<sup>286</sup>

In *State v. Hanapi*,<sup>287</sup> a 1998 criminal trespass case, the Hawai‘i Supreme Court appeared to pull back from *PASH*, holding that “it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is

275. *Id.* at 1268.

276. *Id.*

277. *Id.* at 1258 n.21.

278. *Id.* (emphasis omitted).

279. *Id.* at 1259 (quoting *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1271 (Haw. 1992)).

280. *Id.* at 1268.

281. *Id.* at 1262 n.26 (citation omitted).

282. *Id.* at 1271.

283. *Id.* at 1269–70, 1271 n.43. The court held that “common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state. . . . Consequently, those persons who are ‘descendants of native Hawaiians who inhabited the islands prior to 1778,’ and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1–1, are entitled to protection regardless of their blood quantum.” *Id.* at 1269–70 (citations omitted).

284. *Id.* at 1268.

285. *Id.* at 1272 (emphasis added).

286. *Id.*; see also *id.* at 1262 n.26 (stating that one of the requirements for custom is that the use or right at issue is “obligatory or compulsory (when established)”).

287. *State v. Hanapi*, 970 P.2d 485 (Haw. 1998).

protected.”<sup>288</sup> In order to assert a traditional and customary right as a defense in a criminal trespass case, a defendant must be a “native Hawaiian,” defined as “‘descendants of native Hawaiians who inhabited the islands prior to 1778’ . . . regardless of their blood quantum.”<sup>289</sup> Second, a defendant must also establish that the claimed right “is constitutionally protected as a customary or traditional native Hawaiian practice.”<sup>290</sup> “To establish the existence of a traditional or customary Native Hawaiian practice . . . there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice.”<sup>291</sup> This foundation can be made through testimony of experts or *kama’āina*<sup>292</sup> witnesses as proof of ancient Hawaiian tradition, custom, and usage.<sup>293</sup> Third, a defendant must prove that “the exercise of the right occurred on undeveloped or ‘less than fully developed property.’”<sup>294</sup> The court clarified *PASH* by holding “that if property is deemed ‘fully developed,’ i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is *always* ‘inconsistent’ to permit the practice of traditional and customary Native Hawaiian rights on such property.”<sup>295</sup> The court, however, also reserved “the question as to the status of Native Hawaiian rights on property that is ‘less than fully developed.’”<sup>296</sup>

In the 2000 case *Ka Pa’akai O Ka ‘Āina v. Land Use Commission*,<sup>297</sup> the Hawai’i Supreme Court provided an analytical framework “to effectuate the State’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests.”<sup>298</sup> The court held that a state agency, in this case the Land Use Commission,

must - at a minimum - make specific findings and conclusions as to the following: (1) the identity and scope of “valued cultural, historical, or natural resources” 27 in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources - including traditional and customary native

288. *Id.* at 492.

289. *Id.* at 494 (quoting *PASH*, 903 P.2d at 1270) (emphasis added by court)).

290. *Id.* The court noted that although “[s]ome customary and traditional native Hawaiian rights are codified either in article XII, section 7 of the Hawai’i Constitution or in [Hawaiian Revised Statutes sections] 1–1 and 7–1 . . . [t]he fact that the claimed right is *not* specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed.” *Id.* (citing *PASH*, 903 P.2d at 1259).

291. *Id.* at 495.

292. A *kama’āina* is a person who is “familiar from childhood with [a] locality” and its customs. See *In re Ashford*, 440 P.2d 76, 77 n.2 (Haw. 1968). Because Hawai’i’s land laws are uniquely based on “ancient tradition, custom, practice and usage,” Hawai’i courts generally allow reputation evidence from *kama’āina* in land disputes. *Id.* at 77.

293. *Id.*

294. *Hanapi*, 970 P.2d at 494 (citing *PASH*, 903 P.2d at 1271).

295. *Id.* at 494–95, 495 n.10.

296. *Id.* at 495 (citing *PASH*, 903 P.2d at 1271). In a recent case, the Hawai’i Supreme Court confirmed the analysis that should apply once a defendant has met *Hanapi*’s three requirements. *State v. Pratt*, 127 Haw. 206, 277 P.3d 300 (May 11, 2012).

297. *Ka Pa’akai O Ka ‘Āina v. Land Use Comm’n*, 7 P.3d 1068 (Haw. 2000). The plaintiffs in this case were Native Hawaiian organizations who formed a single association in order to bring suit. *Id.* at 1071. *Pa’akai* is salt and *‘āina* means land; thus, *Ka Pa’akai o Ka ‘Āina* literally means “salt of the land.”

298. *Id.* at 1083–84.



Hawaiian rights - will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.<sup>299</sup>

Native Hawaiians have also found success in asserting their traditional and customary rights in other contexts. In 2004, the Hawai‘i Supreme Court applied the *Ka Pa‘akai* analytical framework in reviewing a contested case hearing decision by the State Commission on Water Resource Management. In *In re Wai‘ola o Moloka‘i*,<sup>300</sup> a water use case from the island of Moloka‘i,<sup>301</sup> the guidelines articulated in *Ka Pa‘akai* led the Hawai‘i Supreme Court to find that the Water Commission had “failed adequately to discharge its public trust duty to protect Native Hawaiians’ traditional and customary gathering rights,”<sup>302</sup> when it granted a water use and well construction permit to a developer without adequately protecting the natural resources that were a basis for exercising customary and traditional gathering practices. The court explained that:

A substantial population of native Hawaiians on Moloka‘i engages in subsistence living by fishing, diving, hunting, and gathering land and marine flora and fauna to provide food for their families. Aside from the nutritional and affordable diet, subsistence living is essential to (1) maintaining native Hawaiians’ religious and spiritual relationship to the land and nearshore environment and (2) perpetuating their commitment to “malama ka aina,” which mandates the protection of their natural ecosystems from desecration and deprivation of their natural freshwater resources.<sup>303</sup>

In another water case, *In re Kukui (Moloka‘i) Inc.*,<sup>304</sup> the Hawai‘i Supreme Court again reviewed a Water Commission decision approving a permit authorizing the use of water on Moloka‘i.<sup>305</sup> The Court determined, *inter alia*, that the Water Commission erred because it “impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice.”<sup>306</sup> In August 2010, Native Hawaiians won another court victory involving *iwi kūpuna*<sup>307</sup> (Native Hawaiian ancestral remains). In *Kaleikini v. Thielen*,<sup>308</sup> the Hawai‘i Supreme Court specifically recognized the constitutional basis in article XII, section 7, for the protection of *iwi kūpuna*.<sup>309</sup>

These cases on traditional and customary rights are significant because they recognize that Hawaiian custom and usage continues in spite of the transition to a fee simple property system, they reaffirm State policy as set out in the Hawai‘i Constitution,

299. *Id.* at 1084.

300. *In re Wai‘ola O Moloka‘i*, 83 P.3d 664 (Haw. 2004).

301. *Id.* at 670.

302. *Id.* at 672.

303. *Id.* at 702.

304. *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 174 P.3d 320 (Haw. 2007).

305. *Id.* at 324.

306. *Id.* at 325.

307. See Edward Halealoha Ayau, chapter 13, *Native Hawaiian Burial Rights*, in HANDBOOK, *supra* note 14, at 245-73, for a discussion of Native Hawaiian beliefs and practices, as well as the laws, related to *iwi kūpuna*.

308. *Kaleikini v. Thielen*, 237 P.3d 1067 (Haw. 2010).

309. *Id.* at 1092.

they validate the exercise of customary practices by Native Hawaiians, and they set some concrete requirements for state agencies to follow in granting development permits.

They also demonstrate how important it is that the country folk (the *kua'āina*) continue in their traditional ways — continue to go to the mountains to get medicinal herbs, continue to gather flowers and ferns to make lei for hula and special celebrations, continue to seek *hala* (pandanus) trees for leaves to weave mats and baskets, continue to catch *ōpae* (small shrimp) in ponds at the seashore. None of these cases could have been brought to court without the *kua'āina* continuing in their ways; all of these cases included *kua'āina* as parties to the lawsuits.<sup>310</sup>

### C. Restoring Hawaiian Language Fluency

There is a well-known Hawaiian proverb stating, *I ka 'ōlelo no ke ola, i ka 'ōlelo no ka make. Life is in speech; death is in speech.*<sup>311</sup> Language is an important repository of knowledge about Indigenous values, concepts, and philosophy. By reacquiring a foundation in *'ōlelo makuahine* (mother-language), Hawaiians have been able to reclaim a uniquely Hawaiian identity and way of seeing the world.

In the early nineteenth century, Hawaiian was the primary medium for commerce, government, and education in Hawai'i. As Hawai'i's government and economic life came to be dominated by Americans, English gained primacy. Beginning in 1846, the Hawaiian legislature determined that all laws were to be published in both Hawaiian and English.<sup>312</sup> In early cases involving discrepancies in the Hawaiian and English versions of various laws, the Hawaiian Kingdom Supreme Court found that the Hawaiian version should control.<sup>313</sup> As the court stated, “where there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country.”<sup>314</sup> A few years later, however, the Legislature passed a law providing, “[i]f at any time a radical and irreconcilable difference shall be found to exist between the English and Hawaiian versions of any part of this Code, *the English version shall be held binding.*”<sup>315</sup>

By 1896, three years after the overthrow of the Hawaiian Kingdom and in order to bolster the case for annexation to the United States, English, which was already the language of government, became the sole medium of instruction in the schools.<sup>316</sup> During

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310. Of the eight decisions discussed above, four were authored by Native Hawaiian members of the Hawai'i Supreme Court, Chief Justice William S. Richardson, and Associate Justice Robert Klein. See Kahikino Noa Detweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005), for a discussion of cases authored by Chief Justice Richardson and Associate Justice Klein.

311. PUKUI, *supra* note 226, at 129.

312. Laws of the Hawaiian Kingdom, Act to Organize the Executive Departments of the Hawaiian Islands, Apr. 27, 1846, ch. 1, art. 1, § 5.

313. See Metcalf v. Kahai, 1 Haw. 225 (Haw. 1856); Hardy v. Ruggles, 1 Haw. 255 (Haw. 1856).

314. Hardy, 1 Haw. 255 at 259.

315. CIVIL CODE OF 1859, § 1493 (emphasis added); see Ka'ano'i Walk, Comment, “Officially” What? *The Legal Rights and Implications of 'Ōlelo Hawai'i*, 30 U. HAW. L. REV. 243, 246-47 (2007) for a discussion of the introduction of English language based schools in Hawai'i.

316. Laws of the Republic of Hawaii, Act of June 8, 1896, No. 57, § 30 (codified in 1897 Haw. Comp. Laws § 123).

Hawai‘i’s territorial period, there was a concerted effort to eliminate the Hawaiian language from public life — from schools, from government, from media — all under the guise of uplifting the Hawaiian people and assimilating them into American society.<sup>317</sup>

Hawaiian was in danger of becoming an extinct language, until efforts in the 1970s and 80s by Native Hawaiians lead to its rebirth. In 1961, only one Hawaiian language professor taught four classes at the University of Hawai‘i campus in Mānoa.<sup>318</sup> In 1983, only 2,000 native speakers remained, many of them over age seventy, and there were less than fifty children who were native speakers; nearly all came from the lone remaining Hawaiian-speaking community on the island of Ni‘ihau.<sup>319</sup>

In 1978, through the advocacy of Native Hawaiians, the Hawai‘i Constitution was amended to state, “English and Hawaiian shall be the official languages of [the State].”<sup>320</sup> The Constitutional Convention committee reports indicate that the amendment was meant to “give full recognition and honor to the rich cultural inheritance that Hawaiians have given to all ethnic groups of this State.”<sup>321</sup> Specifically the delegates “wanted to overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system, and of [insults] today where Hawaiian is listed as a foreign language . . . at the University of Hawaii.”<sup>322</sup> A second amendment adopted in 1978 requires the State to promote the study of Hawaiian culture, history and language and requires a Hawaiian education program in the public schools consisting of language, culture and history.<sup>323</sup>

In 1983, inspired by the Māori immersion preschools, Hawaiian language advocates lead by *kua’āina* from rural communities and most especially Hawai‘i Island, established Hawaiian immersion schools called Pūnana Leo, meaning “language nest” schools. Since English had been the only legally mandated medium of instruction since 1896, Pūnana Leo schools initially operated contrary to state law while attempting to overturn the law.<sup>324</sup> The 1896 English-only law was finally amended, thanks to the efforts of the dedicated Pūnana Leo families.<sup>325</sup>

317. For a general discussion of this period and the suppression of the Hawaiian language, see Paul F. Nāhoa Lucas, *E Ola Mau Kākou I Ka ‘Ōlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAW. J. HIST. 1, 8-10 (2000); see also Walk, *supra* note 315, at 249-50.

318. ALBERT J. SCHÜTZ, *THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES* 362 (1994).

319. LARRY K. KIMURA & WILLIAM WILSON, U.S. DEP’T OF THE INTERIOR, *I NATIVE HAWAIIAN STUDY COMMISSION MINORITY REPORT* 191 (1983).

320. HAW. CONST. art. XV, § 4.

321. *Hawaiian Affairs Comm., Stand. Comm. Rep. No. 57*, in *I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978*, at 637, 638 (1980).

322. *Comm. of the Whole, Rep. No. 12*, reprinted in *I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978*, at 1016 (1980).

323. HAW. CONST. art. X, § 4.

324. SCHÜTZ, *supra* note 318, at 366-67.

325. See Lucas, *supra* note 317, at 11. In 1986, the law was amended to allow “special projects” in the Hawaiian language if approved by the Board of Education. See Walk, *supra* note 315, at 251 (describing the development and expansion of the Kula Kaiapuni program). In 1990, cognizant of a long history of U.S. policies to eliminate native people, their language and culture, Congress passed the Native American Language Act (“NALA”) to encourage native language preservation and particularly the use of native language as a medium of instruction for native children. See 25 U.S.C. §§ 2901-2906 (2006). Unfortunately, the courts have interpreted NALA merely as a statement of policy, without providing any private enforceable rights. See *Office of Hawaiian Affairs v. Dep’t of Educ.*, 951 F. Supp. 1484 (D. Haw. 1996).

When the immersion preschoolers were ready to enter elementary school in 1986, the state had no classes taught in the Hawaiian language and Pūnana Leo students were assigned to “limited English proficiency” classes for immigrants. The Pūnana Leo parents started a boycott school called Kula Kaiapuni Hawai‘i (Hawaiian environment school). A long-standing lobbying battle waged by Hawaiian language advocates including Ni‘ihau native ‘Ilei Beniamina resulted in a two-year pilot program that eventually expanded to offer K-12 public school education in the Hawaiian language.<sup>326</sup> In 1999, the first students educated entirely in Hawaiian in more than a century graduated from high school.<sup>327</sup> By 2004, the Kula Kaiapuni schools had grown to 19 sites statewide with approximately 1,500 students.<sup>328</sup> Currently, three universities in Hawai‘i offer Bachelor of Art degrees in Hawaiian language and two University of Hawai‘i campuses offer master’s degrees in the language.<sup>329</sup> A Doctorate degree in Hawaiian and Indigenous Language and Culture Revitalization is offered at the University of Hawai‘i at Hilo.<sup>330</sup>

Concurrent with the emphasis on increasing Hawaiian language fluency, has been a movement to improve the overall quality of education offered to Native Hawaiian children. Thus, in addition to immersion schools, Native Hawaiian educators and parents started charter schools to address the failure of the public school system in educating Native Hawaiian students and to establish educational institutions according to Native Hawaiian values. The seventeen Native Hawaiian public charter schools, each with a slightly different focus and approach, have combined to form Nā Lei Na’auao, the Native Hawaiian Charter School Alliance.<sup>331</sup> The mission of the alliance is “to establish models of education throughout the Hawaiian Islands, which are community designed and controlled, and reflect, respect and embrace Hawaiian cultural values, philosophies and ideologies.”<sup>332</sup> Today, more than 3,600 students, primarily Native Hawaiians, attend Hawaiian-focused public charter schools and benefit from a curriculum that encompasses Hawaiian language, culture and traditions.<sup>333</sup>

One example is Kanu o ka ‘Āina school on the Island of Hawai‘i, founded in 2000.<sup>334</sup> As Hawai‘i’s first native designed and controlled public charter school, the

326. See Lucas, *supra* note 317, at 11; see ‘ĀHA PŪNANA LEO, A TIMELINE OF REVITALIZATION, [http://www.ahapunanaleo.org/index.php?/about/a\\_timeline\\_of\\_revitalization/](http://www.ahapunanaleo.org/index.php?/about/a_timeline_of_revitalization/) (last visited June 20, 2012).

327. See Walk, *supra* note 315, at 252.

328. See HIST. OF KA PAPAĀHANA KAIAPUNI HAWAI‘I: THE HAWAIIAN LANGUAGE IMMERSION PROGRAM, <http://www.k12.hi.us/~kaiapuni/HLIP/history.htm> (last visited Mar. 3, 2012).

329. See *Graduate Degrees*, U. HAWAI‘I MĀNOA HAWAI‘INUIĀKEA SCH. HAWAIIAN KNOWLEDGE, [http://manoa.hawaii.edu/hshk/index.php/site/degrees\\_grad/en/](http://manoa.hawaii.edu/hshk/index.php/site/degrees_grad/en/) (last visited Mar. 3, 2012); *Ka Haka ‘Ula O Ke‘elikōlani College of Hawaiian Language Graduate and Post-Baccalaureate Certificate Programs* U. HAWAI‘I HILO, <http://hilo.hawaii.edu/catalog/khuok-post-baccalaureate.html> (last visited Mar. 3, 2012).

330. See *Doctor of Philosophy (Ph.D.) in Hawaiian and Indigenous Language and Culture Revitalization*, U. HAWAI‘I HILO, [http://hilo.hawaii.edu/catalog/phd\\_hilcr.html](http://hilo.hawaii.edu/catalog/phd_hilcr.html) (last visited Mar. 3, 2012).

331. See *Nā Lei Na’au’ao Hawaiian Charter School Alliance*, HALAU LOKAHI PUB. CHARTER SCH., <http://www.halaulokahi.com/index.php/education-with-aloha.html> (last visited Mar. 11, 2012).

332. *Id.*

333. In 2009, approximately 3,600 students, with Native Hawaiians comprising nearly 80 percent of the student population, were enrolled in the 17 Hawaiian focused public charter schools. See *Board of Trustees Approve \$1.5 Million for Charter Schools*, OFF. HAWAIIAN AFFAIRS, [http://www.oha.org/index.php?option=com\\_content&task=view&id=1182](http://www.oha.org/index.php?option=com_content&task=view&id=1182) (last visited Mar. 3, 2012).

334. Press Release, Kanu o ka ‘Āina, Kanu o ka ‘Āina New Century Public Charter School Receives Full

school is based on over a decade of indigenous action research, integrating native values and traditions with 21st century educational technology. Some of the culturally driven foundations of the school include use of Hawaiian language at all age levels, strong familial relationships and family involvement — especially utilization of the essential wisdom of elders in the education process — inclusion of Hawaiian protocol and traditional spirituality, and an educational environment that recognizes, respects and promotes Hawaiian values, ideologies and philosophies.<sup>335</sup>

Restoring knowledge and use of the Hawaiian language has opened to Hawaiian scholars and readers a wealth of information. In the thousands of pages of Hawaiian language newspapers, printed from 1834 to the early 20<sup>th</sup> Century, can be found Hawaiian viewpoints on religion, economics, culture, and politics.<sup>336</sup> These newspapers serve as a primary source of information on issues facing Hawai‘i in the nineteenth and early twentieth centuries and present a Native view of historical events in Hawai‘i and the world, and show us how Hawaiians’ nearest *kūpuna* (elders) perceived the many changes and challenges they faced. They also are a tremendous source for rediscovering chants and stories of the ancestors, and it turns out that Hawaiians of that time were prolific writers and composers, recording not only their contemporary stories but recalling and retelling the ancient histories of the Hawaiian people.

## V. CONCLUSION

As these three areas — regaining lands, reclaiming customary practices, and restoring language fluency — demonstrate, Native Hawaiians express their sovereignty through many aspects of their work and lives. Fed by the values, knowledge and experiences of *kua‘āina*, Native Hawaiians continue to ensure their existence as a people. These expressions of cultural sovereignty have led, in each of these examples, to advances in the law, to greater legal protection, and to greater political sovereignty for Native Hawaiians. Undeniably, these expressions of cultural sovereignty, and many other concrete examples, contribute to reshaping and redefining the relationship between Native Hawaiians and the State.

Although political sovereignty — in the guise of state recognition or federal recognition or even independence — is often seen as the final goal, the real work of sovereignty and of self-determination lies in the relationships Native Hawaiians have with the spiritual world and the *‘āina*, with each other, and with other communities in Hawai‘i. Ultimately, political sovereignty would prove hollow indeed without the knowledge, values, and norms that make Native Hawaiians a “unique, distinct, dignified people” who will continue to thrive in their homeland.

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Term Of Accreditation (June 6, 2010), available at <http://kanu.kalo.org> (last visited Mar. 11, 2012).

335. See KANU O KA ‘ĀINA, <http://kanu.kalo.org> (last visited Mar. 11, 2012).

336. See ULUKAU: HAWAIIAN ELECTRONIC LIBRARY, <http://nupepa.org/gsd12.5/cgi-bin/nupepa?l=en> (last visited Mar. 11, 2012).

